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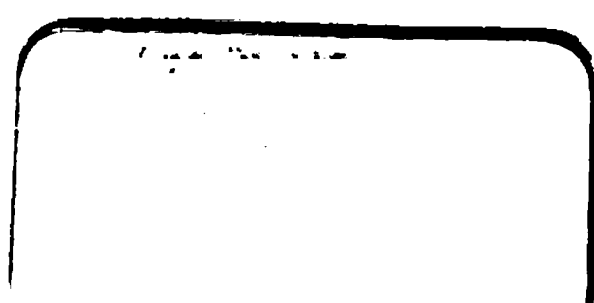
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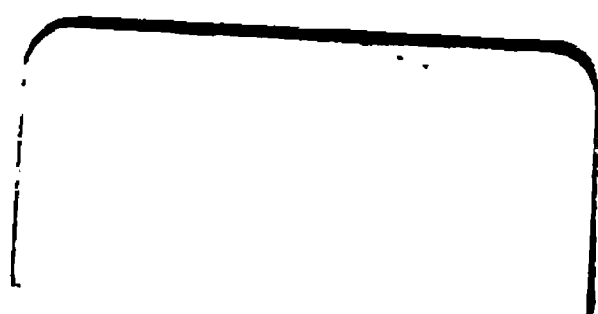
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A TREATISE  
ON  
THE AMERICAN LAW  
OF  
LANDLORD AND TENANT.

By JOHN N. TAYLOR.

EIGHTH EDITION.

EDITED  
By HENRY F. BUSWELL.

VOL. I.

BOSTON:  
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PREFACE

TO :

THE EIGHTH EDITION.

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IN the preparation of this edition, the later decisions have been collected and carefully collated with the text and the notes to the former editions. Such cases as merely affirm or apply legal principles already sufficiently stated in the work are cited by name in their appropriate places, while the substance of those decisions which affirm new principles, or modify or extend the application of familiar rules, will be found embodied in the notes. In all, about one thousand new cases are cited in the present edition.

IN the text of the work, beyond the correction of obvious typographical errors, the only changes made are such as were rendered necessary by judicial decisions reversing or explaining former rulings, and by changes in the statute law. The index has been revised and somewhat enlarged by the addition of new headings and cross-references.

IN the belief that with the increasing size of the book, occasioned by the addition of notes to the successive editions, better means of reference to the subject-matters treated in the work have become

necessary, the editor has prefixed to each paragraph of the text a brief statement of its subject-matter; and these lines are collected into analytical Tables of Contents prefixed to each volume of the work. The editor believes that these additions will be found to increase materially the usefulness of the book.

H. F. B.

Boston, January, 1887.

**PREFACE**  
**TO**  
**THE SEVENTH EDITION.**

---

AT the death of the author of this treatise, the work was found to have received at his hands some preparation for a new edition. But it became apparent upon examination that a revision throughout was still necessary. In discharging this duty, it has been the editor's endeavor to keep intact as far as possible the text as Mr. Taylor left it; and no alteration has been made in the general plan of the book. In a treatise, however, which has occupied this department of law without an American rival for nearly thirty years, considerable changes are indispensable to keep pace with the development of the law and the just requirements of the profession. In preparing this edition, over two thousand cases, the majority of them decided since the last edition, have been carefully examined, and their substance incorporated; the index of matters has been much enlarged and made as comprehensive as space allowed, and the text has been thoroughly revised, for the removal of errors.

Most of the new material has been placed in the notes; but in a few instances substantial additions

have been made to the text; as in the sections on the demise of lodgings; the landlord's liability for the premises while under lease; the tenant's covenant to pay taxes; and the liability of sureties,—the last of which was added by the author. At the same time, the excision of redundant or merely repeated matter, particularly in that portion of the treatise relating to remedies, a condensation of the notes, and the removal from the text to the notes of statutory provisions set out at large, have kept this volume so far within bounds that it will exceed the size of the preceding edition by less than one hundred pages.

JOSEPH WILLARD

Boston, January, 1879.

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**PREFACE**

**TO**

**THE FIRST EDITION.**

---

**THE** following attempt to reduce the Law of Landlord and Tenant to a more than ordinarily concise and systematic form will, it is hoped, meet with the indulgence of the profession for whose use it is principally designed. The learned and voluminous works of Woodfall, Chambers, Comyn, and Platt, are, to a considerable extent, useless in this country; not from any want of accuracy, fulness, or perspicuity, in their treatment of the subject, but from their failing to exhibit a satisfactory view of this branch of law, as modified by our republican institutions, and re-formed by the commercial spirit of our age. An exposition of the law on this side of the Atlantic, on a subject of such daily and hourly interest, which shall exhibit the various relations of the parties to a tenancy as understood among us, unincumbered by the useless learning of the English treatises, and adapted to our particular circumstances, has, therefore, become a matter of importance, not only to the profession, but to the entire community.

This work does not aspire to the merit of having achieved so desirable an object, but is merely intended to present a practical summary of the doctrines of the common law,—including the English cases, so far as they are applicable in the United States, with their statutory alterations and modifications, and the leading decisions in those States where legal science has been most cultivated and improved.

Some topics have been introduced which are not usually discussed in treatises on this subject, but are still intimately connected with it, and must therefore be found useful to the practitioner. Beginning with several modes of creating a tenancy, its varieties, commencement, and termination, the work proceeds to treat of the formal parts of the instrument of demise, its execution, and the capacity of the various contracting parties thereto; explains the rights and liabilities generally incident to the relation of landlord and tenant, embracing the subjects of division-fences and party-walls, of mutual liabilities for negligence, of nuisances and easements, with rights of way, commons, fisheries, watercourses, removal of buildings, and support from neighboring soil and buildings. It then examines the special covenants and conditions which the parties usually employ for the purpose of limiting and defining their respective rights and duties; the consequences of an assignment of the lease, as well as of the reversion; the several modes of dissolving a tenancy, and the consequences of a dissolution, including the penalty of holding over, the

right to emblements, and the removal of fixtures; together with the legal remedies open to either party, and a selection of the most approved precedents of leases and forms of proceeding.

If, in the execution of the design, some topics have been omitted, or others not so fully discussed as, in the opinion of some persons the subject would seem to warrant, it is to be borne in mind that the admission of everything connected incidentally, as well as directly, with the relation of landlord and tenant, would have increased the work to an extent inconsistent with the original object.

That object was to furnish a compendium, which should not only be useful to the profession in the ordinary routine of business, but of easy reference to every member of the two great classes of society whose rights and duties are the subject of inquiry. The Author will feel satisfied if, in this attempt to abridge the labors of an arduous profession, he shall in any tolerable degree have succeeded in exhibiting so accurate and concise an exposition of his subject as will be useful to practical men, whether in or out of the profession.





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# **LANDLORD AND TENANT.**



# THE LAW

OF

## LANDLORD AND TENANT.

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### INTRODUCTION.

§ 1. THE relative position of a civil government to its citizens — that of protection on the one hand, and of dependence on the other — necessarily involves the idea of allegiance and service to the State, as a condition to the use and enjoyment of the land within its boundaries. Hence some mode of tenure is incident to every government; and the highest estate which a man can have in land has direct reference to his duty to the State, being called a tenancy in fee-simple; while the occupant is a tenant in fee, and is said to have and to hold his lands, to him and his heirs. He holds of the State to which he owes fealty and service; and, if he fails in his allegiance to her, or dies without heirs upon whom this duty may devolve, the tenure is at an end, his land returns to the common stock from which he had it, and vests again in the Prince, or other representative of State sovereignty, whoever it may be; who is thence called, in common-law language, the lord paramount.

§ 2. This tenure necessarily gives rise to another legal relation, which springs up between the original tenants to the State and the various individuals among whom they find it convenient or necessary to divide their possessions, for purposes of cultivation or improvement. And this relation is necessarily modified in its character by the peculiar structure

of the government under which it subsists. History teaches that all municipal law is, in fact, but a reflection of the policy and manners of the age from which it sprung ; while the history of our law exhibits the feudal institutions of our Norman ancestors extensively incorporated throughout the whole body of modern jurisprudence, but most intimately with that portion of it which forms the subject of this Essay. It will, consequently, be found difficult, if not impossible, to form correct ideas of this particular mode of tenancy, and of the various changes through which the relation of landlord and tenant has passed, from the barbarism of ancient Europe, to the humanity and refinement of free America, without some previous knowledge of the history and character of the feudal ages, in which it was nurtured, if it did not originate.

§ 3. By the theory of the English law, upon which our legislation on this subject is essentially based, all property in land, since the Norman Conquest, is derived from the Crown. The King, after that event, portioned it out in large districts to the prominent men who surrounded him and who had been useful to him in war, and were capable of advising him in peace. These again subdivided their districts among their immediate followers and dependents, the actual occupants and cultivators of the soil. To all such grants, however, an express reservation of military service was annexed ; each of the principal feudatories becoming, in turn, the head of a military power, always liable to be called into action, and ever ready to defend his chief. As a compensation for this service, the vassal was entitled to the use of the soil, the fee remaining in the lord ; but he was regarded rather as a bailiff or servant, accountable for the profits of, than as having any direct property in, the land. His tenure, or fief, as it was called, was of the most precarious kind, depending entirely on the pleasure of his lord, and afforded little if any encouragement to the improvement and cultivation of the land.<sup>1</sup>

<sup>1</sup> The Norman period is assumed in the text, for the purpose of exhibiting the doctrine of tenures ; but there is no reason for thinking that the material parts of the feudal tenure, as exercised by the Normans, did not exist in England before their arrival. A large portion of the lands en-

§ 4. It soon, however, appeared to be so manifestly just that one who had sowed and cultivated the land should be allowed to reap the crop, that fiefs, which were at first so precarious, presently became annual. Having advanced to this degree of permanence, they were next granted during a term of years, in favor of men who had employed their means and labor in building, planting, and improving, and who would have no inducement to do so, unless they were permitted to enjoy the fruits of their labors for a reasonable period. Then, as it would be hard to deprive a man of his possessions, who had always done his duty, and performed the conditions on which he received them, chieftains soon began to consider themselves entitled to demand the enjoyment of their lands for life. Finally, it was found that a man would more willingly expose himself in battle, and devote himself more unreservedly to his lord's service, if assured that his family should inherit his possessions, and not be left in poverty by his death; whereupon fiefs became hereditary.<sup>1</sup>

§ 5. But, although a certain degree of stability thus began to attach to these tenures, they were burdened with the most tattered in the Conqueror's celebrated Domesday-book, are stated to be held by the same tenure, at the same rent, and subject to the same services, as they were in the time of Edward the Confessor; and the internal evidence of Domesday bears no reference to any simultaneous surrender of former tenures, or any re-grant of the same lands as feudal. The Normans probably introduced some new provisions into existing tenures, and attempted more; and we know there was a contest between them and the English, whether many of those laws which had been neglected for a time should be restored or not. But the fact of their having been restored will serve to show that no great change was ultimately allowed to prevail; and that the general system of the laws continued much the same under the new dynasty as it had been under that of the Saxons, with the exception of such usurpations as were from time to time forced upon the English. Spel. Gloss. 219; M. & S. Hist. of Boroughs, 69; Hale's Hist. Com. Law, 120. See also Co. Lit. 64, a, note; 2 Bl. Com. 48; Reeves's Hist. Eng. Law, vol. i. p. 8; Gilb. on Ten. 80; Bacon on Leases, 1.

<sup>1</sup> Whatever uncertainty there may be as to the time when feudal tenures were first introduced into England, there seems to be none that terms for years were of common occurrence prior to the reign of Edward the First, as the statute of 6 Edw. I. c. 11, refers to a letting for a term of years, apparently as an ordinary event.



onerous incidents. No man could dispose of his lands, either by sale or by will, for ever so short a period, without the consent of his superior. The possessor was not the proprietor, but the mere beneficiary, and could not oblige his superior to accept of any vassal or occupant that was not agreeable to him. Hence arose fines for alienations, escheats, reliefs, wardships, and primer seisins.<sup>1</sup> Women were obliged to marry the nominee of the lord or forfeit their lands, and frequently paid large sums for the privilege of making their own choice in marriage. Justice itself was openly bought and sold; and the King's court, the highest judicature in the kingdom, was, under this detestable policy, open to none but those who brought presents. The miserable vassal was in fact, as well as in name, his lord's man. Surrendering to him his intelligence with his independence, his whole life was spent in a laborious and degraded vassalage upon the soil, where he received protection and from which he derived subsistence. The tenure by which he held was *feudal*; and the whole policy of the system — which originated, in all probability, with the Gothic conquerors of the Roman Empire — essentially warlike, though servile in its character, was well calculated to defend by arms that which had been obtained by force. The feudal system remained in operation during the time that the laws and institutions of England were in the process of formation, and necessarily gave character to them; and although it was essentially abolished during the reign of Charles the Second, when it came to be considered as destructive of the public peace, and opposed to the progress of society;<sup>2</sup> yet

<sup>1</sup> Fines upon alienations are in modern times known as bonuses or gratuities, which the owner receives as the consideration of granting his permission to the transfer of a lease, restrained by a covenant against assigning.

<sup>2</sup> The military tenure of land had been originally created as a means of national defence; but, in the course of ages, whatever was useful in the institution had disappeared, and nothing was left but ceremonies and grievances. A landed proprietor, who held an estate under the Crown by knight-service, — and it was thus that most of the soil of England was held, — had to pay a large fine on coming to his property. He could not alienate an acre without purchasing a license. When he died, if his domains descended to an infant, the sovereign was guardian, and was not

the traces of its policy are still distinctly visible on both sides of the Atlantic, much of its technical language is retained, and many of its arbitrary rules yet exist.<sup>1</sup>

§ 6. We have seen that a leading characteristic of feudal tenures had been, that the vassal took the profits, while the property of the soil remained in the lord; the lord's seignior, together with the vassal's feud, made up the whole estate. But by a series of legislative enactments, forced from the hand of unwilling power by the gradual advance of intelligence, and the resistless demands of the money-king, *Commerce*, these separate properties were at length blended into one estate; and the period finally arrived when the true proprietor held his lands of no superior lord to whom he owed

only entitled to great part of the rents during the minority, but could require the ward, under heavy penalties, to marry any person of suitable rank. The chief bait which attracted a needy sycophant to the court was the hope of obtaining, as the reward of servility and flattery, a royal letter to an heiress. These abuses had perished with the monarchy (of Charles I.). That they should not revive with that of Charles II. was the wish of every landed gentleman in the kingdom. They were therefore solemnly abolished by statute (at his restoration); and no relic of the ancient tenures in chivalry was suffered to remain, except those honorary services which are still, at a coronation, rendered to the person of the sovereign by some lords of manors. — Macaulay's *England*, vol. i. 144.

<sup>1</sup> The restraints upon alienation mentioned in the text, being of feudal origin, were predicated upon that provision of feudal law which prohibited the lord from alienating his property to such an extent as to lose the ultimate control over it. Hence, at common law, restraints upon the alienation of lands in fee could only be imposed by persons having a reversion, or at least a possibility of reversion, in them. Chancellor Kent (3 Com. 506) gives an outline of the various causes which gradually led to the mitigation of these severe restrictions, until they were finally removed (except as to the King's tenants *in capite*) by the statute of *quia emptores terrarum*. In the State of New York, the Acts of Oct. 22, 1779, transferring the seignior of all lands, escheats, &c., from the King to the people of that State, and the Act of Feb. 20, 1787, putting an end to all feudal tenures, and substituting a tenure between each landholder and the people in their sovereign capacity, removed the entire foundation on which the right of the grantor to restrain alienation in any shape had formerly rested. The subject is very ably discussed in the arguments of counsel and of the learned judge (Ruggles) who delivered the opinion of the court in the case of *De Peyster v. Michael*, 6 N. Y. 467.

homage, fealty, or other arbitrary service. He now had the entire right and dominion over the estate, and, subject only to the right of eminent domain, which the State never relinquishes, might alienate his land in any way and for any period he thought proper. His land was no longer trammelled by feudalism, nor locked up from commerce, but he possessed that free and full control over it which has been found so useful and necessary in the business of life, and thence enjoyed an estate called *allodial*.<sup>1</sup>

§ 7. There had been an intermediate species of feudal tenure, called a *socage* tenure; but its incidents, although more definite and certain, were scarcely less rigorous and obnoxious than the arbitrary and uncertain tenure by knight-service. The term itself was applicable to freehold tenures of the Crown, and to all others, which were not military tenures, but they were always deemed to be of an inferior and servile character. As intelligence, however, increased, society advanced; commerce began to flourish, and military services became less requisite; while agricultural productions were more in demand, and the lord soon found his interest in commuting the one for the other. The substitution of a certain service, or the rendition of a stipulated sum, in place of all uncertain and arbitrary, and therefore tyrannical, servitude, was a decided step taken towards the establishment of that freedom which the people were soon to enjoy. Still, however, the principal difference between these several species of tenure for a long time continued to be, that the services and incidents of the latter were of a fixed and certain character; while the former enjoyed not even this poor privilege.

§ 8. The remote and isolated position of the United States preserved, to a great extent, their independence of these embarrassing tenures; and, with a slight exception, their present condition includes no tenure but that which we have said is

<sup>1</sup> From a privative, and *lode* or *leude*, a vassal; that is, without vassalage. Land possessed by a man in his own right, and which owes no rent or service to any superior, is held in *allodium*. 2 Bl. Com. 104; 9 Cow. 437.

incident to every free government.<sup>1</sup> The law of nations has always acknowledged the right of a nation to acquire property, and sovereignty, over any uninhabited country which it discovers without a previous owner, if it proceeds to occupy and settle the country so discovered within a reasonable time. But the question has been left unsettled, whether a nation may lawfully take possession of a country where there are none but wandering tribes, whose scanty population is incapable of occupying the whole. It is admitted, however, to be lawful to confine such tribes within fixed limits, whenever it becomes necessary to make use of the land of which they stand in no particular need, and of which they make no actual and constant use. The discovery of America, consequently, conferred upon the government by whose authority such discovery was made the ultimate dominion of the soil, with the right of granting title thereto.<sup>2</sup> The original settlers of this country invariably respected the Indian right of occupancy; and although some of the royal patents authorized them to take possession of and colonize their chartered domains, yet, following the example of the New England Puritans, the colonists generally, if not uniformly, recognized the Indian title, and from time to time acquired by fair purchase such lands only as the Indians were willing to sell.<sup>3</sup> The

<sup>1</sup> The principles of English liberty were strong in the bosoms of our ancestors when they fled from feudal oppression, and founded on this western shore a government of equal laws, and of equal rights. They steadily opposed the introduction of any of the laws or institutions of the mother country which were not in conformity to those principles, or which in any respect violated the rights of the original owners of the soil. As to a tenure of land among the savages, there was none; no individual cultivated land for his own benefit, or claimed protection in its enjoyment. It was only when civil government was established, and they were subjected to its sway, that it became necessary to define the tenure by which they, as well as all other settlers upon the lands of the State, should be thenceforth held.

<sup>2</sup> *Worcester v. The State of Georgia*, 6 Pet. 515; *Johnson v. McIntosh*, 8 Wheat. 543.

<sup>3</sup> Vattel, book i. ch. 18, says, "We cannot help praising the moderation of the English Puritans, who first settled in New England [and he might have added of the first settlers in all the other colonies] who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the lands they resolved to cultivate." The United States Government continues the practice to this day.

General Government has acted upon the same humane principle ; and the Indian title has, by this mode, become nearly extinguished throughout the wide expanse of our national domain.

§ 9. Early Colonial Charters and Royal Grants usually contained a qualification that the land thereby granted should be held of the Sovereign by a common socage tenure. But when the States succeeded to the authority of the British government, and occupied the feudal position of lord paramount, which had formerly been held by the Crown, they gradually, and in some instances at once, threw off the restriction, and by express legislation declared all tenure of land within their borders to be allodial. In New York, the legislature of 1778 abolished military tenures and all their incidents, retrospectively, from the 30th August, 1664, when the province was surrendered by the Dutch to the English. It next abolished tenure in socage *in capite*, with its fruits and consequences ; and converted all manorial and other tenures into free and common socage ; reserving only the rents and services due upon such tenures from the persons previously entitled to them, together with the right of distress, as incident thereto. In October, 1779, the absolute property of all lands and tenements, and of all royalties, dues, and services which before the 9th of July, 1776, belonged or were due to the Crown of Great Britain, was declared to be vested in the people of the State, in whom the sovereignty and seigniorship thereof were also declared to be vested since that day. But the Revised Statutes, in 1830, went the entire length of abolishing the existing theory of socage tenures of every description, with their incidents, and declared that all lands within the State should thenceforth be held upon a uniform allodial tenure, vesting the entire and absolute property in the owners, according to their respective estates. At the same time they provided that no rents, or services certain, which had been at any time previous, or might thereafter be created or reserved, should be thereby taken away or discharged. This statutory provision has now, by the adoption of the Constitution of 1846, become a fundamental law of the State.

§ 10. Allodial estates have, in fact, no mark or incident of tenure attached to them, being enjoyed in absolute right ; while the term *tenure* employed by the statute implies the holding of an estate from some superior, and a subjection to an ultimate dominion, which, we have seen, is abolished except so far as is necessarily implied in the duty of allegiance to the State ; but the term is used in the statute in a popular sense for right or title, retaining the phraseology of English law without its significance, and serves to show how tenacious a grasp the feudal principle has had on the public mind and policy, that its language must still be retained, although the thing itself has ceased to exist in any shape.

§ 11. If any feudal fiction or service can yet be supposed to remain in any part of the United States, it is believed to consist solely in the principle that lands may be held of a person to whom the payment of a determinate rent, or certain service instead of rent, is due, as to a lord paramount. But this wants the essential characteristic of a feud, since it exists only by virtue of an express and voluntary contract between the parties ; and, if retained at all, in any sense, received a most important modification by the Revolution of 1776, which transferred the entire domain, with the sovereignty of Great Britain, to the people of the United States. So that fidelity to the State is now the only fealty that any man owes for his lands ; his only lord paramount is the people of the State where such lands are situated.

§ 12. All private title to land within the United States is derived ultimately, as we have seen, from grants of the State, or general government, or from royal grants which were made prior to the Revolution, and confirmed by those governments.<sup>1</sup> These grants to the original proprietors — of which the manor lands in New York may be cited as instances <sup>2</sup> — were

<sup>1</sup> *Fletcher v. Peck*, 6 Cranch, 87 ; *Jackson v. Waters*, 12 Johns. 365.

<sup>2</sup> In this State certain purchasers, or, as they were variously called, patentees, patroons, or lords, early obtained from the British sovereigns letters patent, granting large districts in the central regions of the Colony. Some of these proprietors, in a spirit of emulation then deemed

frequently of very large extent, and, from the inability of the proprietors to cultivate them, could have been of but little use to the owners, so long as they remained entire in their hands; while the public would necessarily want that strength and security which land well peopled and cultivated invariably produces. Hence it became necessary and proper to subdivide these large tracts amongst those who would undertake to cultivate and improve the land, to the advantage, not only of the proprietor, but of the public.

§ 13. The return usually made by tenants employed in the cultivation of such land was an annual contribution of corn, cattle, or other produce; or in the performance of some service, either in the family of the proprietor or upon the farms which he retained in his possession. In proportion, however, as agriculture improved and money increased, it was

harmless and laudable, obtained permission from the Crown to erect manors within these districts, with certain political, judicial, and legislative privileges and advantages, which have long since become obsolete. With reference to those advantages, however, they adopted a system of granting lands, not absolutely in fee-simple by deeds, but as qualified estates in fee-simple, by instruments which are commonly called leases, whereby the patroon or landlord reserved for his own use all water-power and mineral wealth. Perpetual rents were reserved; portions of which were paid in wheat and supplies for the table of the proprietor, and the residue in services or labor, to be performed by the tenants about his manor-house. Alienation by the tenants was restrained, unless with the lord's consent, to be obtained by paying to him one-quarter, or some other part of the purchase-money. The right to distrain for rent—a severe but not then unusual legal remedy—was incorporated in the leases, with stringent covenants for the payment of taxes and other purposes; and with various conditions securing to the landlord a right to re-enter and resume the land. However unwise for both contracting parties such conveyances may now seem, it ought to be remembered that, at the time of their institution, they were not at all anomalous, and they contributed to the settlement of extensive districts by an industrious population, who had not sufficient capital to become absolute purchasers of estates. The validity of these leases in fee, reserving a perpetual rent, the source of much angry litigation, has been at length definitely established by the court of last resort, in the cases of *Van Rensselaer v. Hays*, 19 N. Y. 68; and *The Same v. Ball*, *ib.* 100; *Van Rensselaer v. Barrenger*, 89 N. Y. 9.



found that these services, although burdensome to the tenant, were of little advantage to the proprietor ; and that the produce of a large estate could be much more conveniently disposed of by the farmers themselves who raised it, than by the landlord or his bailiff, who was formerly accustomed to receive it. A commutation was therefore made of *rents* for *services*, and of money for those in kind ; and as men in a subsequent age discovered that farms were better cultivated where the farmer enjoyed a security in his possession, the practice of granting leases for a fixed period at length generally prevailed. Such appears to have been the origin of farming leases, while in cities and towns, it is obvious, the investment of money in houses, whose rental will produce a convenient periodical income, naturally presents one of the most certain and regular returns for the employment of capital, — conferring, at the same time, an important benefit upon men of moderate means, by enabling them to occupy hired houses and stores, and to devote the whole of such capital as they possess to the purpose of commerce. The terms and duration of possession, and the mode of enjoyment, in either case necessarily assume the shape of a contract, *express* or *implied*, which constitutes a *lease* ; while the parties themselves are placed in the relation of landlord and tenant.



## CHAPTER I.

## THE CREATION OF A TENANCY.

§ 14. **Arises from Lease or Demise. — Rent.** — The relation of landlord and tenant subsists by virtue of a contract, express or implied, between two or more persons for the possession of lands or tenements, in consideration of a certain rent to be paid therefor. The contract itself is called a *lease* or *demise*, and is a species of conveyance for life, for years, or at the will of one of the parties, usually containing a reservation of *rent* to the *lessor*. The rent may consist in the payment of a certain sum of money, or its equivalent, at particular specified periods during the term, or in one entire sum on the completion of the contract. But a stated rent is not essential to the contract; because, from favor, or for a consideration passing to the lessor at the time of its inception, a lease, beneficial in its nature to the lessee, may be made without any reservation of rent.<sup>1</sup> Independently of the idea of a contract, a lease also possesses the property of passing an interest, and thence

<sup>1</sup> *Hunt v. Comstock*, 15 Wend. 667; *Dolittle v. Eddy*, 7 Barb. 74; *4 Cruise*, 15; *Orleans Theat. Ins. Co. v. Lafferranderie*, 12 Rob. La. 472; *Osborne v. Humphrey*, 7 Conn. 340; *Hooten v. Holt*, 139 Mass. 54. An agreement that the tenant's occupation is to be rent-free may be implied from the circumstances attending the inception of the tenancy. *Sherwin v. Lasher*, 9 Bradw. (Ill.) 227. And the occupant's written acknowledgment that he holds the premises as tenant does not raise a presumption of law that he promises to pay rent, the promise to pay in such a case, implied from occupation and tenancy, being an inference of fact. *Savings Bank v. Getchell*, 59 N. H. 281. The agreement implied by a demise, that the lessee shall quietly enjoy the premises, is a sufficient consideration for the lessee's agreement to pay rent. *Vernam v. Smith*, 15 N. Y. 327; *Whitney v. Lewis*, 21 Wend. 131. But a promise by a tenant, holding under a lease by deed, to pay an additional sum for the use of a part of the premises, was held to be without consideration, and consequently void. *Tryon v. Mooney*, 9 Johns. 358.

partakes of the nature of an estate, which, when limited to a certain period for the enjoyment of land, becomes a *term* for years ; but, if it depends upon the duration of a life or lives, rises to the dignity of a freehold.<sup>1</sup>

<sup>1</sup> The particular regard which the common law shows to the tenant of a freehold, and the preference given to him above a tenant for years, depends upon feudal principles which have no application to the condition of society under a republican government. In feudal times this estate was, perhaps, more valuable and permanent than an estate for years, as long terms were then unknown ; or more honorable, as a proof of military tenure, which embraced privileges only allowed to tenants of the King who took the oath of fealty — an oath which was never permitted to be taken by any whose estate was less than for life. But the statutes of New York and other States have modified this doctrine by making the interest of a lessee an estate in land, and declaring it to be subject to the lien of a judgment, and liable to taxation, and to be sold under execution, the same as real estate. 1 N. Y. R. S. 722; Trustees, &c. v. Dunn, 22 Barb. 402; 7 Wend. 468 (though *aliter* in Ohio); Haz. Powd. Co. v. Loomis, 2 Disn. 544. Hence ejectment lies for it. Ollendorff v. Cooke, 1 Lansing, 37. It must also be foreclosed as realty, Griffin v. M. Co. Chicago, 52 Ill. 130; Patrick v. Littell, 36 Ohio St. 79; and gives the tenant such an interest in land as entitles him to redeem it from a prior lien, Averill v. Taylor, 8 N. Y. 44. An estate for years, however long, goes to the executor as personal assets of the testator, and does not descend as real estate to the heir-at-law. 2 R. S. 82, § 6; Dillingham v. Jenkins, 15 Miss. 479; *Ex parte* Gay, 5 Mass. 419; Edwards v. Perkins, 7 Oregon, 149; Provost, &c. v. Dumfries, 46 Ind. 172. And this is held to be the rule in Maryland, in the case of a lease for ninety-nine years, renewable forever, and therefore partaking of the nature of a perpetual interest, and capable of being made perpetual. Taylor v. Taylor, 47 Md. 295. The vendor of a term of years has no lien for unpaid purchase-money after he has parted with the possession, as if it were real estate. Cade v. Brownlee, 15 Ind. 369. Where a lessor devised the leased property to a trustee to collect the rents during the term of the lease, it was held that, after the lessor's death, the trustee might sue for arrears of rent accrued, as well before as after the lessor's death, the lessor's executor assenting. Shillingford v. Good, 95 Pa. St. 25. In Georgia, a lease is a chattel, and an estate for years realty. Code, §§ 2247, 2253. A grant of a term at a gross sum for rent was held to be real estate. In Massachusetts, under the general rule, it was held that an outstanding lease for years, as creating only a chattel interest, did not invalidate a policy of fire insurance for the lessor's benefit, in which the ownership of the assured was described as entire, unconditional, and sole. Dolliver v. St. Joseph Ins. Co., 128 Mass. 815; and see Insurance Co. v. Haven, 95 U. S. 242.

§ 15. **Term. — Interesse termini. — Entry Essential.** — The estate of a lessee for years is called a term, *terminus*, because its duration is limited and determined; for every such estate must have a certain beginning and a certain end. It is perfected only by the entry of the lessee; for, before the time fixed for entry, the whole estate remains in the lessor, and the lessee has strictly no estate in the land, but merely a right thereto which is called an *interesse termini*,<sup>1</sup> an interest which, though assignable, cannot be the foundation of a release, to operate by way of enlargement, from the lessor, nor qualify the owner to maintain an action of trespass or ejectment.<sup>2</sup> After the period fixed for the commencement of the lease, the lessee's interest is still called an *interesse termini*; and although he cannot maintain trespass, if not actually in possession,<sup>3</sup> he may maintain an action of ejectment;<sup>4</sup> and has such an estate as may be divested by an adverse entry;<sup>5</sup> but not be the subject of an eviction.<sup>6</sup> And though this interest will neither merge nor can be surrendered, because until entry the lessor's estate is not a reversion,<sup>7</sup> yet the title will have passed from him to the lessee.<sup>8</sup> The lessee may enter at any time, notwith-

<sup>1</sup> *Williams v. Bosanquet*, 1 Brod. & B. 238; Co. Lit. 46, b; *Copeland v. Stephens*, 1 B. & A. 593, 606. But it is otherwise where the instrument of demise takes effect under the Statute of Uses. Smith, Landl. & T. 12. And where the estate of the grantor is in reversion or remainder, the termor takes an immediate estate in a reversionary term, and not an *interesse termini* merely. *Doe v. Brown*, 2 Ellis & B. 331.

<sup>2</sup> *Saffyn's Case*, 5 Co. 123, b; Co. Lit. 46; 2 Bl. Com. 64, 144, 314. "A release to him before entry," says Littleton, "is void." In *Wood v. Hubbell*, 10 N. Y. 488, relief in equity was granted to one entitled to an *interesse termini*, where the premises were destroyed by fire before the term began. See *LaFarge v. Mansfield*, 31 Barb. 345.

<sup>3</sup> Co. Lit. 296, b; *Wheeler v. Montefiore*, 2 Q. B. 133; *Litchfield v. Ready*, 5 Exch. 939; *Lowe v. Ross*, *ib.* 553; *Harrison v. Blackburn*, 17 C. B. n. s. 678; *Brewer v. Stevens*, 13 Allen, 346, 350.

<sup>4</sup> *Gardner v. Keteltas*, 3 Hill, 332; *Trull v. Granger*, 8 N. Y. 115; *Whitney v. Allaire*, 1 N. Y. 311; *Tyler v. Heidorn*, 46 Barb. 439, 455; *Doe v. Day*, 2 Q. B. 156; *Ryan v. Clark*, 14 *id.* 65; though otherwise in Pennsylvania; *Sennett v. Bucher*, 3 Penn. 393.

<sup>5</sup> *Saffyn's Case*, *supra*.

<sup>6</sup> *Birckhead v. Cummings*, 33 N. J. 44, 45.

<sup>7</sup> *Doe v. Turner*, 5 B. & C. 111; Co. Lit. 338, a; *ib.* 270, a.

<sup>8</sup> *Chung Yow v. Hop Chung*, 11 Oregon, 220. Thus in *Ryan v. Clark*,

standing the death of his lessor, and after entry he becomes absolute owner of the premises for the term granted, the instrument taking effect from the time of its execution. The entry of a lessee is not, however, necessary to entitle the lessor to sue for rent, since it becomes due by virtue of the contract, and not by reason of the entry; except in the case of a tenancy at will, where rent becomes due only in consequence of the occupation.<sup>1</sup>

§ 16. **Term, Assignment of. — Under-lease.** — A *term* signifies not only the limitation of time, or period granted to the lessee, for the occupation of the premises, but it includes also the estate and interest in the land that pass during such period. The words “lease” and “demise” are often used to signify the estate or interest which is conveyed, but they properly apply to the instrument or means of conveyance. And it is essential to a lease that some reversionary interest be left in the lessor;<sup>2</sup> for if by an instrument purporting to be a demise, he parts with his whole interest in the premises, or makes a lease for a period exceeding his own term, it will, in either case, amount to an *assignment* of the term.<sup>3</sup> But if a lessee disposes of the term granted to him, reserving any portion thereof,

*supra*, a tenant holding over was allowed to maintain trespass against his lessor for entry on his premises after a demise to a third party, Patteson, J., saying: “The interest and legal possession, when the term is commenced immediately, and not in the future, vests in the lessee before entry.” So in *L’Huissier v. Zallee*, 24 Mo. 12, the right to have summary process against a first lessee who held over, vested in the second lessee.

<sup>1</sup> *Bellasis v. Burbrick*, 1 Salk. 209; *Hardy v. Winter*, 38 Mo. 106. Hence lessee under a parol lease *in futuro* is liable for rent and not for damages only. *Becar v. Flues*, 64 N. Y. 518. But see *Caldwell v. Centre*, 30 Cal. 539, 542. The time between the making of the lease and that for its commencement in possession, is no part of the term granted by it. *Young v. Dake*, 5 N. Y. 463.

<sup>2</sup> *Harker v. Birkbeck*, 3 Burr. 1556; 1 Black, 482.

<sup>3</sup> *Pluch v. Digges*, 5 Bligh, n. s. 31; *Hicks v. Downing*, 1 Ld. Ray. 99. Where an instrument purported to lease and convey, for a fixed annual rental, for a term of years, all the coal under certain lands, it was held to be a mining-lease and not an absolute grant of the coal. *Austin v. Huntsville &c. Co.* 72 Mo. 585.

however small, the instrument will operate as an *under-lease*.<sup>1</sup> And the materiality of the distinction consists in this, that, while an assignee is liable to the original lessor for all the obligations of the lessee, by virtue of the privity of estate that subsists between them, no action can be maintained by the lessor against an under-tenant, upon any covenant contained in the lease, since there is neither privity of estate, nor of contract between himself and the sub-lessee.<sup>2</sup>

<sup>1</sup> *Van Rensselaer v. Gallup*, 5 Den. 454. Thus *Piggott v. Mason*, 1 Paige, 412; *Davis v. Morris*, 36 N. Y. 569, where the last day was reserved; *Crusoe v. Bugby*, 3 Wils. 234, where three months. So where sub-lessee covenants to redeliver on the last day. *Collamer v. Kelley*, 12 Iowa, 319; *Martin v. O'Connor*, 43 Barb. 514; *Kearney v. Post*, 2 N. Y. 394. In *Linden v. Hepburn*, 3 Sandf. 668; *People v. Robertson*, 39 Barb. 9,—reservation of rent and right of re-entry were held a sufficient reversion, but this last case is maintainable on another ground, and the former is contrary to settled authority, 2 Preston, Conv. 124; *Doe v. Bateman*, 2 B. & A. 168, where right of re-entry, and *Wollaston v. Hake-will*, 3 Scott, N. R. 616, and *Townsend v. Read*, 15 Abb. N. C. 285, where greater rent was reserved.

<sup>2</sup> In Texas the rule stated is statutory; Pasch. Dig. Arts. 5027, 5028. See *Gibson v. Mullican*, 58 Tex. 430; *Le Gierse v. Green*, 61 *id.* 128. The doctrine of the text seems established in England after considerable variance in the cases. These cases have generally arisen between the lessee and the party to whom he has transferred his whole term by an instrument in form a demise, and the former has been held to have no reversion left or any right derivable therefrom, such as the right to distrain. The contrary doctrine maintained in *Pluck v. Digges*, 2 Hud. & Br. 1, and *King v. Wilson*, 5 Mann. & R. 157, note, is now overruled. *Pluck v. Digges*, 5 Bligh, N. S. 31; *Parmenter v. Webber*, 8 Taunt. 593; *Fitzgerald v. O'Connell*, 1 Jo. & Lat. 134, 156; *Hicks v. Downing*, 1 Ld. Ray. 99; *Preece v. Corrie*, 5 Bing. 24. In *Langford v. Selmes*, 3 Kay & J. 220, the doctrine contended for in 5 Mann. & R. 157, n., that tenure may still subsist between lessee and his transferee without a reversion in the former, is controverted; and in *Wollaston v. Hakewill*, *supra*, such a transferee was held liable to the lessor in an action of covenant for rent, and in *Beardman v. Wilson*, L. R. 4 C. P. 57, on the covenant to repair. But it seems equally well settled that if the parties intend a lease, the relation of landlord and tenant, as to all but strictly reversionary rights, will arise, though the lessee demises his whole term. In *Poultney v. Holmes*, 1 Stra. 405, such a transfer was held to be a lease because void as an assignment. This was affirmed in *Preece v. Corrie*, 5 Bing. 24, in *Baker v. Gostling*, 1 Bing. N. C. 19, where the rent reserved was held technically rent, and barred by an eviction, and in *Pollock v. Stacy*, 9

§ 17. **Demisable Property, what.**—As to what property may be demised, it is a general rule that anything corporeal or incorporeal, lying in livery or in grant, may be the subject of a demise. And, therefore, not only lands and tenements, but commons, ways, watercourses, fisheries, franchises, estovers, annuities, rent-charges, and all other incorporeal hereditaments, are included in the common-law rule.<sup>1</sup> A railway company may also lease its franchises and property, by au-

Q. B. 1033, where an action of use and occupation was held to lie. But this case is doubted in *Beardman v. Wilson*, *supra*. So on such a demise ejectment lies. *Doe v. Bateman*, 2 B. & A. 168; *Hogan v. Fitzgerald*, 1 Hud. & Br. 77, n.; *Walsh v. Feely*, Jones (Ir.), 413; or debt or covenant for rent, *Baker v. Gostling*, *supra*; *Ards v. Watkin*, Cro. El. 637, 651; *Williams v. Hayward*, 1 Ellis & E. 1040. In the United States the law seems to be the same, and while the right of distress is gone, *Ragsdale v. Estis*, 8 Rich. 429; *Prescott v. Deforest*, 16 Johns. 159; and the landlord may have covenant for rent against such sub-lessee, *Constantine v. Wake*, 1 Sweeny, 239; and the term returning, though by demise, to the lessor, merges, for want of a reversion, *Shepard v. Spaulding*, 4 Metc. 416; *Smiley v. Van Winkle*, 6 Cal. 605; yet the lessee may create the relation of landlord and tenant without retaining a reversion, *Tyler v. Heidorn*, 46 Barb. 439; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Same v. Read*, 26 *id.* 576; may have ejectment, *Same v. Slingerland*, *ib.* 580; *Tyler v. Heidorn*, *supra*; covenant or debt for rent, *Patten v. Deshon*, 1 Gray, 325; *Demarest v. Willard*, 8 Cow. 206; *Willard v. Tillman*, 2 Hill, 274; *Wallace v. Harmstad*, 44 Pa. St. 492; or summary process, see *Shumway v. Collins*, 6 Gray, 227; *Blumenberg v. Myers*, 32 Cal. 93. So *Den v. Post*, 1 Dutch. 285, where a covenant not to underlet was held to include an under-lease for the whole term. In Wisconsin, by R. S. § 2189, it is provided that an action for rent may be maintained by the lessor against any party who has entered under the lessee and is found in possession of the premises. See *Wittman v. Milwaukee &c. Railway Co.* 51 Wis. 89.

The effect of a demise by the lessee of his whole term is, therefore, to divest him of his reversionary rights, and render his lessee liable as assignee, to the lessor; but at the same time the relation of landlord and tenant is created between the parties to the demise if they so intended.

<sup>1</sup> *Shep. Touch.* 268; *Bac. Abr. Leases (A)*; *Commonwealth v. Weatherhead*, 110 Mass. 175; *Eastham v. Anderson*, 119 *id.* 526; *Morrill v. Mackman*, 24 Mich. 279; *Comm'rs v. Clark*, 33 N. Y. 251; *Taylor v. Beebee*, 8 Rob. N. Y. 262. Turpentine trees are the subject of a lease. *Rooks v. Moore*, Busb. N. C. 1. So growing timber, grass, &c. *Freeman v. Underwood*, 66 Ma. 229.

thority of the Legislature.<sup>1</sup> So goods, and other personal chattels, may be demised; but, although rent cannot be said, technically, to issue out of them, the contract for its payment is valid, and an action for rent in arrear may be maintained upon such leases; while the lessee is liable at the end of the term for the non-delivery of the articles themselves, or their value, as any other bailee.<sup>2</sup> But the attempt of the tenant to sell any of them, determines the tenancy as to such articles, and the general owner may sue either the tenant who sold the property, or the purchaser in trover, for a return of the things themselves.<sup>3</sup>

<sup>1</sup> *Black v. Del. & Rar. Canal Co.*, 7 C. E. Green, 130; *Troy & Rutland R. R. Co. v. Kerr*, 17 Barb. 601; *Commonwealth v. Smith*, 10 Allen, 455. If a railroad is leased by its owners to one who assumes the duty of repairing it, such owners still remain liable to third parties, who may be injured by the defective condition of the road. *Hamden v. New Haven & Northampton Co.*, 27 Conn. 164.

<sup>2</sup> *Zule v. Zule*, 24 Wend. 76. But in *Fay v. Holloran*, 35 Barb. 295, the technical rule was applied, and on lessor's decease no apportionment of rent was allowed for stock, parcel of the demise, because rent issues only from land. So in *Sutliff v. Atwood*, 15 Ohio, N. S. 186, the assignee of a lease of lands and stock was held liable for the whole rent, though he did not get the stock. *Spencer's Case*, 5 Co. 16, 3d resolution; *Newman v. Anderton*, 5 B. & P. 224; *Farewell v. Dickinson*, 6 B. & C. 251; *Salmon v. Matthews*, 8 M. & W. 827; *Morris v. Tillson*, 31 Ill. 607; *Armstrong v. Cummings*, 20 Hun. 313.

The contrary doctrine was laid down in *Mickle v. Miles*, 31 Pa. St. 20; and rent from chattels held distrainable. So in *Newton v. Wilson*, 3 Hen. & M. 470, rent from chattels, parcel of the demise, was held apportionable; and as no eviction can take place from a part of demise from which no rent flows, *post*, § 385, it would be absurd that on a demise of a farm valuable only for the stock, or of a shop for its machinery, the lessor might take the stock or machinery, and the lessee be still held for the rent.

<sup>3</sup> *Swift v. Mosely*, 10 Vt. 208; 28 *id.* 1; *Farrant v. Thompson*, 5 B. & A. 826; *Billings v. Tucker*, 6 Gray, 368. If the object of the demise is special, as to bore wells for salt, and the lessee brings oil to the surface, it belongs to the owner of the soil. The lessee is not in such case bound to collect the oil for the owner, he may let it run to waste; but if he does collect it, and appropriates it to his own use, he must account for it to the owner. *Petersen v. Kier*, 2 Pittsb. Pa. 191. The sale of a leasehold interest is to be construed strictly, and a written contract selling a "lease" does not carry with it oil that had theretofore been pumped from oil wells on the leased premises. *McGuire v. Wright*, 18 W. Va. 507.



§ 18. **Personal Chattels upon the Land, how demisable.**—It is frequently found convenient, also, to include in the contract of lease the sheep or other live-stock, and farming implements upon land, or the furniture and other chattels of a house, and they have hence, to a certain degree, acquired demisable qualities; although the interest which passes to a lessee of such things is very different from that which is transferred by the lease of a house, land, or other hereditament. The lessee has the use of them during the term, and may be restrained from destroying, selling, or giving away any part of them; but the lessor's reversionary interest is considered of so precarious a nature as to be accounted in law a mere possibility.<sup>1</sup> No lease or grant can, consequently, be made of them, during or after a term in possession, until the lessee has redelivered them. In case of a lease of live-stock, the absolute property of such as die vests in the lessee; as also do the calves, lambs, or other produce of such stock, which are considered to be profits, severed from the principal object of demise in compensation for the rent paid by the lessee.<sup>2</sup> It is the usual practice in such leases to annex a schedule of the several articles proposed to be included in the demise, and to insert a covenant upon the part of the lessee, to redeliver them at the end of the term; and without such covenant the lessor is said to have no other remedy at law but trover or detinue for them, after the lease is ended.<sup>3</sup>

<sup>1</sup> He cannot maintain either trover or trespass for them pending the lease. *Trisany v. Orr*, 49 Cal. 612.

<sup>2</sup> A lease of a farm for five years, with the cows and sheep thereon, contained a provision that cows and sheep of equal age and quality should be returned at the expiration of the lease. Held that, during the continuance of the lease, the cattle belonged to the lessee, and might be taken on execution for his debts. *Carpenter v. Griffin*, 9 Paige, 310.

<sup>3</sup> *Putnam v. Wyley*, 8 Johns. 432; *Newton v. Wilson*, 3 Hen. & M. 470; Co. Lit. 57, a; *Spencer's case*, 5 Co. 16, b; *Billings v. Tucker*, 6 Gray, 368. Where cattle were leased for a term of years, to be taken back by the owner within the term if he should think them unsafe in the hands of the lessee, held that the lessor could not reclaim them until after fair notice given. *Wyman v. Dorr*, 3 Me. 183. An agreement by the lessor to convey chattels, included in the lease, to the lessee, at the end of the term, upon due performance of the lessee's covenants, is a condi-



## SECTION I.

## A TENANCY BY IMPLICATION.

§ 19. **When implied; generally.**—The relation of landlord and tenant may be created by implication or by express contract. The law will, in general, imply the existence of a tenancy wherever there is an ownership of land on the one hand, and an occupation by permission on the other; for in such cases it will be presumed that the occupant intended to pay for the use of the premises.<sup>1</sup> It will be implied, in many cases, where there has been no distinct agreement between the parties, or where, from various causes, the agreement may have ceased to be operative. Thus, the permissive occupation of premises previous to or pending the execution of a lease, or the payment of rent under an invalid agreement, are circumstances from which this relation will be implied, sufficient to authorize the collection of subsequently accruing rent.<sup>2</sup> And,

tional sale, and the title to the chattels remains in the lessor till the end of the term. *Bean v. Edge*, 84 N. Y. 510.

<sup>1</sup> It is held that the presumption thus created is not a presumption of law. *Savings Bank v. Getchell*, 59 N. H. 281. But it is also held that one entering into possession with full notice of the rent demanded is under contract obligation to pay such rent although he refuse to do so, or declares that he will pay only under protest. *Thompson v. Sanborn*, 52 Mich. 141. The payment and receipt of rent are the strongest evidence to establish the existence of a tenancy. *Doe v. Jefferson*, 5 Houst. 477. A mother's occupation of her son's house is presumed to be on condition that she shall pay rent. *Harlan v. Emery*, 46 Iowa, 538; and see *Doe v. Jefferson*, *supra*. One who is in as servant of the owner, but is permitted by the owner to sublet to another, becomes thereafter a tenant and not a servant. *Snedaker v. Powell*, 32 Kan. 396.

<sup>2</sup> *Hammerton v. Stead*, 3 B. & C. 478; *Dunne v. Trustees*, 39 Ill. 578; *Pinero v. Judson*, 6 Bing. 206; *Anderson v. Midland R. R.*, 30 L. J. Q. B. 94; *Larned v. Hudson*, 60 N. Y. 102; *Gustin v. Burnham*, 34 Mich. 50. But where the occupation is without the owner's consent, no tenancy arises. *Ackerman v. Lyman*, 20 Wisc. 454. A notice to quit is a recognition of an existing tenancy. *Doe v. Miller*, 2 C. & P. 348. An occupant is one who has the actual use or possession of a thing; and occupancy implies the exclusion of every one else from enjoyment. *Redfield v. Utica*

if a man enters upon land under a void lease, he cannot be treated as a disseisor, but becomes a tenant at will, and can only be removed after notice.<sup>1</sup> So the taking of the key of a house, for the purpose of occupying it, but without going into actual occupation, has been held to imply a tenancy.<sup>2</sup> The relation is also created by statute between a grantee of the reversion, and the lessee of the grantor, of premises which are under lease at the time of the conveyance;<sup>3</sup> and is held to exist as between the grantor and grantee of a conveyance in fee, which reserves rent, and applies to each subsequent assignee of the land so conveyed.<sup>4</sup> And, as a general rule, it may be stated that the mere occupation of land, with the owner's concurrence, will enure as a tenancy from year to year, or at will, according to circumstances, determinable at the pleasure of the owner.<sup>5</sup>

& Sy. R. R., 25 Barb. 54. Thus in the case of mutual depasturing of land by the parties, there is no tenancy to be implied between them, it being a case of mutual licenses granted by each party to the other. *Stone v. Wait*, 50 Vt. 663.

<sup>1</sup> *Digby v. Atkinson*, 4 Camp. 275; *Denn v. Fearnside*, 1 Wils. 176; *Doe v. Watts*, 7 T. R. 83.

<sup>2</sup> *Little v. Martin*, 3 Wend. 219.

<sup>3</sup> *Funk v. Kincaid*, 5 Md. 404; and see, *post*, §§ 180, a, 295, 441.

<sup>4</sup> *Van Rensselaer v. Smith*, 27 Barb. 104; *Same v. Hays*, 19 N. Y. 68; *post*, §§ 50, 295.

<sup>5</sup> *Boudette v. Pierce*, 50 Vt. 212; *Vetter's Appeal*, 99 Pa. St. 52; *Marvel v. Ortlip*, 3 Del. Ch. 9; *Cressler v. Cressler*, 80 Ind. 366; *Oxford v. Ford*, 67 Ga. 362; *Towery v. Henderson*, 60 Tex. 291; *Hulett v. Nugent*, 71 Mo. 132; *Ellsworth v. Hale*, 33 Ark. 683. A tenancy does not exist as between the owner of land and one who, at his invitation, and without any agreement as to rent, has occupied it. *Strickland v. Hudson*, 55 Miss. 235. So where the occupant is put in possession for the benefit of the owner, and retains possession till notified to quit. *Middleton's Ex'rs. v. Middleton*, 85 N. J. Eq. 141. Any person entering into demisable premises by the consent or connivance of the tenant becomes a tenant, at the option of the landlord. *Benson v. Bolles*, 8 Wend. 175; *Jackson v. Miller*, 6 *id.* 228; *Graves v. Porter*, 11 Barb. 592. See *Hall v. West. Transp. Co.*, 34 N. Y. 284. If he enters into possession of vacant premises which have been previously demised by the consent of the tenant, he will be considered, in respect to the landlord's rights, to have been substituted in place of the tenant, although he may disclaim all privity with the landlord. *Bacon v. Brown*, 9 Conn. 358; *Howard v. Ellis*, 4 Sandf. 369. But see *Jackson v. Mowry*, 30 Ga.

§ 20. **Implied from special Circumstances.** — The intention to create a tenancy may also be inferred from a variety of other circumstances; as where lands descended to an infant, with respect to whom the tenant in possession was a trespasser, and an action of ejectment was brought and compromised by the infant's attorney upon certain terms, one of which was that the tenant should attorn to the infant, a tenancy was held to have been thereby created, although the infant had not assented to it, nor received rent since he came of age.<sup>1</sup> And a similar result was said to have been produced where a *feme covert* lived separate from her husband, and received to her separate use the rents of certain lands, which came to her by devise, after separation; for it was presumed that she received such rents by her husband's authority, and accordingly held that he could not maintain ejectment, at least before giving notice to the tenant to quit.<sup>2</sup> So where the owner of a house agreed that his creditor might occupy it for a year, and until he paid a mortgage held by the creditor; and also where a man entered under an agreement to accept a lease for a certain period, at a specified rent, but subsequently refused to

14; *Moore v. Calvert*, 6 Bush, 356. Where a tenant for years made a conveyance in fee, of the premises, under which the grantee entered, the latter was held to be in as assignee of the tenant, *Jackson v. Davis*, 5 Cow. 123; for a deed conveys only the interest of the grantor. 1 N. Y. R. S. 739, § 143; *Doe v. Brown*, 8 East, 165. An action for use and occupation of premises may arise from the mere waiver of a tort, or the simple letting into possession. Per Patterson, J., in *Church v. Imp. Gas Light Co.*, 6 Ad. & E. 854.

<sup>1</sup> *Doe v. Noden*, 2 Esp. 530. A party entered into possession of premises under an agreement for a lease at a certain rent, and occupied them more than a year, but paid no rent; an account was afterwards delivered to him by the landlord charging him with half a year's rent, the amount of which he at first disputed, but admitted that half a year's rent was due, and named the amount, and the account was altered accordingly. Held, that a yearly tenancy might thereby be implied, and that the landlord had a right to distrain. *Cox v. Bent*, 2 M. & P. 281; 5 Bing. 185.

<sup>2</sup> *Doe v. Biggs*, 1 Taunt. 367. A parol demise from one of three joint grantees to his co-grantees, was held to be implied from the facts, that he paid none of the purchase-money, claimed no title, and exercised no control over the premises for forty years. *Webster v. Holland*, 58 Me. 168.

accept it, — in each case the relation of landlord and tenant was held to exist.<sup>1</sup>

§ 21. **No Implication from mere Occupancy.** — But the mere occupancy of property does not necessarily imply the relation of landlord and tenant, for if no rent has been paid, and no concurrent act of the parties, or other circumstance exists, from which consent to a tenancy on the part of the owner may be inferred; or if the consent was conditional and has since been forfeited, a tenancy cannot arise from mere occupation.<sup>2</sup> And if a man gets possession of a house without the privity of the owner, although the parties may afterwards enter into a negotiation for a lease, but differ about the terms, and the negotiation goes off; or if, after being let into possession, under an agreement to sign a written lease, and find surety for the rent, he does neither; no species of tenancy is created, but the occupant, in either case, becomes a mere trespasser.<sup>3</sup>

<sup>1</sup> *Hunt v. Comstock*, 15 Wend. 665; *Anderson v. Prindle*, 23 *id.* 616; and one who enters under an occupancy apparently permitted by the landlord may claim to be treated as tenant. *Marquart v. Lafarge*, 5 Duer, 559. An instrument conveying premises to the grantee for the purpose of mining coal so long as there is coal to mine thereon, with provisions for bank rents, and forfeiture for non-compliance with its terms, was held to be a lease, and not a contract in the nature of a servitude. *Gartside v. Outley*, 58 Ill. 211.

<sup>2</sup> *Rich v. Bolton*, 46 Vt. 84; *Edmonson v. Kibe*, 43 Mo. 146; *Jordan v. Mead*, 19 La. Ann. 101; *Cook v. Norton*, 48 Ill. 20; *Williams v. Deriar*, 31 Mo. 13; *Leonard v. Kingman*, 136 Mass. 123. The use of the unimproved bank of a river, in mooring rafts, does not create this relation between the riparian owner and the proprietor of the rafts, *Hall v. Jacobs*, 7 Bush, 595; and there can be no recovery for use and occupation. *Stewart v. Finch*, 2 Vroom, 17. But a person so holding is not a trespasser without a demand and refusal. *Carson v. Baker*, 4 Dev. 220.

<sup>3</sup> *Doe v. Pullen*, 2 Bing. (N. C.) 749; *Doe v. Quigley*, 2 Camp. 505; *Doe v. Cartwright*, 3 B. & A. 326; *Fisk v. Moores*, 11 Rob. La. 279. In *McEldery v. Flanagan*, 1 H. & G. 308, a second lessee of premises, pending a first lease, was held not tenant of the first lessee by mere notice from him. In *Howard v. Carpenter*, 22 Md. 10, one who had received a license from a *cestui que trust* authorized to lease, but had paid no rent, was held liable to be ejected by the trustees without notice or demand. In *Doe v. Butt*, Walm. & H. 3, a party let in on condition of finding security, was

§ 22. **Implication from Tenant's holding over.** — A tenant for years who holds over after the expiration of his term without paying rent or otherwise acknowledging a continuance of the tenancy, becomes either a trespasser or a tenant, at the option of the landlord. Very slight acts on the part of the landlord, or a short lapse of time, are sufficient to conclude his election and make the occupant his tenant.<sup>1</sup> But the tenant has no such election; his mere continuance in possession fixes him as tenant for another year if the landlord thinks proper to insist upon it.<sup>2</sup> And the right of the landlord to continue the tenancy will not be affected by the fact, that the tenant refused to renew the lease, and gave notice that he had hired other premises.<sup>3</sup> In Massachusetts and in some of the other New England States where tenancies from year to year are unknown, a tenant holding over is said to be in merely by sufferance. He remains a trespasser, and can only become a

held no tenant after two years' stay. In *Kerrains v. People*, 60 N. Y. 221, a servant on ceasing to occupy as such was held not to become at once a tenant. So, on the other hand, if the owner agrees to give a lease and the tenant enters, but the owner then refuses, and tenant quits, he is not liable for use and occupation. *Greton v. Smith*, 83 N. Y. 245. The relation of landlord and tenant can only arise where he who is in possession has, by some act or agreement, recognized the other as his landlord, and taken upon himself the character of a tenant under him, so that he is not at liberty afterwards to dispute his title. Per McCoun, J., in *Benjamin v. Benjamin*, 5 N. Y. 388.

<sup>1</sup> *Rowan v. Lytle*, 11 Wend. 619; *Giles v. Comstock*, 4 N. Y. 270; *Den v. Adams*, 7 Halst. 99; *Adams v. Decker*, 6 *id.* 84; *Townley v. Rutan*, Spen. 604; *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151. The rule will not apply when the tenant holds over with the landlord's consent, as pending negotiations for a new lease. *Smith v. Alt*, 7 Daly, 492; s. c. 4 Abb. (N. C.) 205. Nor to the case of tenancy of personal property. *Chase v. Sec. Ave. R. R. Co.*, 97 N. Y. 384.

<sup>2</sup> *Conway v. Starkweather*, 1 Den. 113; approved in *Witt v. New York*, 5 Rob. (N. Y.) 248; 6 *id.* 441. And see *Vrooman v. Kaig*, 4 Md. 450; *Moore v. Beasley*, 3 Ohio, 294; *People v. Paulding*, 22 Hun, 91; *Elwood v. Forkel*, 35 *id.* 202; *Wolffe v. Wolffe*, 69 Ala. 549. The rule is embodied in the statutes of Kansas, G. S. c. 55, § 2; and see *Adams Exp. Co. v. McDonald*, 21 Kan. 680.

<sup>3</sup> *Schuyler v. Smith*, 51 N. Y. 809; *Bacon v. Brown*, 9 Conn. 334; *Hemphill v. Flynn*, 2 Pa. St. 144; *McGregor v. Rawle*, 57 *id.* 184; *Noel v. McCrory*, 7 Coldw. 623.

tenant by mutual agreement.<sup>1</sup> But when mutual consent is required, the occupant of a house by submitting to a distress for rent, which is stated in the notice of distress to be due by him to the person distraining, has been held to acknowledge a tenancy from that person.<sup>2</sup> And where a tenant, after the expiration of his term, remained in possession, claiming to hold until the landlord should pay him the appraised value of the improvements he had made during the term, which by a provision of the lease the landlord was bound to do; he was held not to be discharged from the payment of rent, but to come under the general rule, that a tenant holding over after the expiration of his lease, with the consent of the landlord,

<sup>1</sup> *Edwards v. Hale*, 9 Allen, 462; *Ellis v. Paige*, 1 Pick. 43; *Withers v. Larrabee*, 48 Me. 570; so *Ackerman v. Lyman*, 20 Wisc. 454, one entering without owner's consent cannot be held by him as tenant at his election. *Russell v. Fabyan*, 84 N. H. 218, where the tenant held over, and the court say, "the reply of the tenant negatives any consent on his part to remain as tenant." And such seems to be the law in England, for in the leading case, *Right v. Darby*, 1 T. R. 159, 162, *Ld. Mansfield* says, "If there be a lease for a year and by consent of both parties the tenant continues, they are supposed to have renewed the old agreement, which was for a year." In *Ibbs v. Richardson*, 9 Ad. & E. 849, the tenant holding over was sued for a year's rent as holding from year to year, but held liable only for time he had occupied. So *Cobb v. Stokes*, 8 East, 358; *Levi v. Lewis*, 6 C. B. N. S. 766; and until such agreement the tenant is liable only for the time he occupies. So also per *Patterson, J.*, *Church v. Gas Co.*, 6 Ad. & E. 854.

<sup>2</sup> *Panton v. James*, 3 Camp. 372. So a holding over after a notice from his landlord that if tenant remains it will be at certain terms, is an acceptance of those terms. *Griffith v. Knisely*, 75 Ill. 861. So a tenant holding over under a treaty for a lease is at will, not sufferance. *Emmons v. Scudder*, 115 Mass. 367. Payment of a quarter's rent, by a person in actual occupation, is evidence of a yearly tenancy, at the rent proportioned to the quarterly payment. *Morris v. Niles*, 12 Abb. Pr. 103; *Richardson v. Langridge*, 4 Taunt. 128; *Knight v. Benett*, 3 Bing. 861. But see *Blumenberg v. Myers*, 32 Cal. 98; *Stoppelkamp v. Mangeot*, 42 *id.* 307; *Skaggs v. Ekers*, 45 *id.* 154, that the only tenancy is for the period for which the rent was actually paid, or agreed to be paid. Where a mortgagee, notwithstanding a former lease of the property, acknowledged himself to be in possession, and promised to pay rent, he was held to have thereby created the relation of landlord and tenant. *Goodman v. Jones*, 26 Conn. 264.

becomes a tenant from year to year, subject to the terms and conditions of the original lease.<sup>1</sup>

§ 23. **Fact of, not conclusively presumed from Receipt of Rent.** — But the receipt of rent is only a *prima facie* acknowledgment of the existence of a tenancy, and is always subject to explanation; for where the amount received does not appear to have been paid as rent, or bears but a small proportion to the annual value of the premises, the rule does not apply.<sup>2</sup> And if a lease is not void, but voidable only, the receipt of rent under

<sup>1</sup> *Holsman v. Abrams*, 2 Duer, 435. The landlord is subject to the same rule, and can recover no more than the rent originally reserved. He is not entitled to an increased rent, proportioned to the increased value of the premises. *Holsman v. Abrams*, *supra*. Where the tenant holding over paid during a part of the time of such holding a rent greater than that reserved in the lease, it was held, notwithstanding, that the continuance of the occupation, and the payment and receipt of rent implied a renewal of the lease from year to year upon the same terms, save as modified as to amount of rent, and that the lessee might avail himself of the benefits of the covenants contained in the original lease. *Clarke v. Howland*, 85 N. Y. 204. But notice being given to the tenant that if he occupied beyond the subsisting term he must pay an increased rent, naming the sum, the tenant, although he held over, was held not bound to pay the increased rent unless he assented. But such assent will be inferred if he holds over and remains silent. *Galloway v. Kerby*, 9 Bradw. (Ill.) 501. As to the distinction between a "holding over" and a "re-letting," provided for in the lease, as affecting the covenants contained in the lease, see *Moseley v. Allen*, 138 Mass. 81. It is a question of fact whether a temporary and partial occupation of the premises after the expiration of the lease amounts to a renewal. *Elevator Co. v. Brown*, 36 Ohio St. 660.

<sup>2</sup> *Right v. Bawden*, 3 East, 260; *Den v. Rawlins*, 10 East, 261; *Claridge v. Mackenzie*, 4 M. & G. 143; *Doe v. Baston*, 11 Ad. & E. 307; *Doe v. Brown*, 7 *id.* 447. It is a question for a jury to determine whether the payment made was intended as an acknowledgment of a tenancy. *Doe v. Wilkinson*, 3 B. & C. 413. Where payment of rent unexplained would ordinarily imply a yearly tenancy, it is open to the payer or receiver of such rent to prove the circumstances under which the payment was made, for the purpose of repelling such implication. *Doe v. Crago*, 6 C. B. 90. The party paying is always at liberty to explain the payment. *Doe v. Francis*, 2 M. & Rob. 57. To create a yearly holding the payment must be in reference to such a holding. *Braythwayte v. Hitchcock*, 10 M. & W. 494.



it does not create a new tenancy, although it may establish a former one.<sup>1</sup> Nor will a new tenancy be created by a mere agreement for an increase of rent in the middle of a term.<sup>2</sup> In general, however, if rent is not paid and received *as such*, but stands upon some other consideration, it will not be considered as evidence of a design to establish a tenancy.<sup>3</sup>

§ 24. **Mere Joint Occupancy, or Occupancy on Shares not a tenancy.** — A mere participation in the profits of land with a joint occupation, or an occupation which does not exclude the owner from possession, will not amount to a tenancy.<sup>4</sup> This was held in a case where the provisions of an agreement between the defendant and a hotel company were, that the defendant should reside with his family in the hotel, free of charge for board, conduct the same in the manner contemplated by the parties, and have the exclusive management thereof, and that the furniture, at the end of the term should be restored to the company by the defendant.<sup>5</sup> Nor does

<sup>1</sup> Doe v. Bancks, 4 B. & A. 401.

<sup>2</sup> Doe v. Kendrick, cited in Adams Eject. 129; Geekie v. Monk, 1 Car. & K. 370; 5 Q. B. 841. Nor will a verbal license by a tenant to the landlord for the occupation by the latter of part of the demised premises at a certain rate, vary a written agreement between them as to the amount of rent. Hilton v. Goodhind, 2 C. & P. 591. And where there was a letting by two tenants in common, at an entire rent, and one of them afterwards gave notice to the lessee to pay a moiety of the rent to him, it was held to be a question for a jury to determine whether the notice created a new contract, or only made an alteration in the mode of receiving rent. Powis v. Smith, 5 B. & A. 850.

<sup>3</sup> Right v. Bawden, 3 East, 260; Den v. Rawlins, 10 *id.* 261. The payment of rent, to constitute a tenancy, must be made by the party in the capacity of tenant. Strahan v. Smith, 4 Bing. 91. And its mere payment is no evidence of any particular manner of holding. Phillips v. Mosely, 1 C. & P. 262.

<sup>4</sup> Burgie v. Davis, 34 Ark. 179; Shields v. Purnell, 64 Ala. 504. But now, in Alabama, under Code, §§ 3474-78, renting on shares creates the relation of landlord and tenant. See Wilson v. Stewart, 69 Ala. 302.

<sup>5</sup> State v. Page, 1 Spear, 408. To the same effect is Walker v. Fitts, 24 Pick. 191; Johnson v. Carter, 16 Mass. 443. One staying at an inn or hotel is a guest, and not a tenant. Bac. Abr. tit. Inn, c. 5, 6. A contract for board and lodging at a hotel or boarding-house does not create the relation of landlord and tenant. Wilson v. Martin, 1 Den.



permission to a laborer and his wife to occupy a house on the farm where they are at work, in part compensation for services, create that relation.<sup>1</sup> So, if land is agreed to be cultivated *upon shares*, it does not amount to a lease with rent to be paid in produce; for the possession of the land remains in the owner, and the parties are merely tenants in common of the crop.<sup>2</sup> If, however, the lessee agrees to pay a certain part of the crop expressly as *rent*,<sup>3</sup> or if he holds the land with the usual privileges of an exclusive enjoyment, it creates a tenancy for the time agreed upon, though the land may have been taken to cultivate on shares.<sup>4</sup> So the technical form

602; *post*, § 66. So in *Funk v. Haldeman*, 53 Pa. St. 229, a deed conveying the right to enter and prospect mines, with exclusive right to one acre round each mine, was held not to exclude the owner, and to be no lease, but a license only.

<sup>1</sup> *Haywood v. Miller*, 3 Hill, 90; *People v. Annis*, 45 Barb. 304; *McQuade v. Emmons*, 9 Vroom, 897; *Doyle v. Gibbs*, 6 Lans. 180; *Sutherland v. Carter*, 52 Mich. 471. He occupies as a servant and not as tenant, and the possession is that of the master. *Kerrains v. People*, 60 N. Y. 221; and see *Smith v. Rice*, 56 Ala. 417.

<sup>2</sup> *Oakley v. Schoonmaker*, 15 Wend. 226; *Maverick v. Lewis*, 3 McCord, 211; *Bradish v. Schenck*, 8 Johns. 151; *Edgar v. Jewell*, 5 Vroom, 259; *Daniels v. Brown*, 34 N. H. 454; *Warner v. Hoisington*, 42 Vt. 94. Authority to dredge for oysters is a license, and not a lease passing the possession. *Colchester v. Brooke*, 7 Q. B. 339. So where a person employed in a particular capacity is permitted to occupy a house as incidental thereto, for which a sum is deducted from his wages, he cannot on being dismissed from employment be regarded as a tenant. *Hunt v. Colson*, 8 Moore & S. 790. But see *Hughes v. Chatham*, 5 M. & G. 54. Defendant agreed to build houses on the plaintiff's land and procure tenants for the same at a given rate, and himself pay the rent till he so procured tenants. Held, that under this contract no tenancy was created between the parties. *Taylor v. Jackson*, 2 C. & K. 22. In *Curtis v. Cash*, 84 N. C. 41, an arrangement by which A. was to furnish land, team, and feed therefor, and B. was to devote his time and attention to the cultivation of the land and pay expenses, the gross products to be divided, was held a partnership. But see *Day v. Stevens*, 88 *id.* 88.

<sup>3</sup> *Hoskins v. Rhodes*, 1 Gill & J. 266; *Newcomb v. Agan*, 2 Johns. 421; *Alwood v. Ruckman*, 21 Ill. 200; *Durant v. Taylor*, 89 N. C. 351.

<sup>4</sup> *Jackson v. Brownell*, 1 Johns. 267; *Tuttle v. Bebee*, 8 Johns. 152; *De Mott v. Hagarman*, 8 Cow. 220; *Doremus v. Howard*, 3 Zab. 390; *Fry v. Jones*, 2 Rawle, 11. A lease upon shares is a personal contract, and, as such, is not assignable where the amount of rent received depends

of a lease reserving as rent the crops to be divided between the parties, creates a tenancy of the land, and the landlord retains an interest in the crops only by express reservation.<sup>1</sup>

on the character and skill of the lessee, or where it gives the lessee the use of the lessor's tools on condition that they be properly kept. *Randall v. Chubb*, 46 Mich. 311. But see *Dworak v. Graves*, 16 Neb. 706.

<sup>1</sup> *Warner v. Abbey*, 112 Mass. 355; *Darling v. Kelley*, 113 *id.* 29; *Geer v. Fleming*, 110 *id.* 39; *Sargent v. Currier*, 66 Ill. 245; *Jordan v. Staples*, 57 Me. 132; *Foster v. Penry*, 71 N. C. 131; *Harrison v. Ricks*, *ib.* 7; *Lang v. Weaver*, 49 Ind. 103; *Steele v. Morse*, 52 *id.* 32; *Froot v. Harding*, 56 *id.* 165; *Cunningham v. Baker*, 84 *id.* 597; *Chicago & W. M. Railway v. Linard*, 94 *id.* 319; *Larkin v. Taylor*, 5 Kansas, 433; *Strain v. Gardner*, 61 Wis. 174, where an agreement, under seal, to cultivate a farm on shares for one year was held a lease. The ancient common law declared parties to be tenants in common of the crop, and the lessor still possessed of the land if the agreement was for one crop only: *Hare v. Celey*, Cro. El. 143; followed by *Bradish v. Schenck*, 8 Johns. 151; *Bishop v. Doty*, 1 Vt. 37; but where for more than one crop, it made a lease: *Stewart v. Doughty*, 9 Johns. 108; *Decker v. Decker*, 17 Hun, 13; and see *Schmitt v. Cassilius*, 31 Minn. 7; *Cooper v. McGrew*, 8 Oregon, 327. But other and later decisions have rejected this test: *Moulton v. Robinson*, 7 Fost. 550; *Aiken v. Smith*, 21 Vt. 180; *Putnam v. Wise*, 1 Hill, 246; and rested solely on the terms made use of, construing the agreement a lease wherever rent was reserved or terms of demise employed, or an intention to that effect otherwise clearly appeared: *Orcutt v. Moore*, 134 Mass. 48; *Fry v. Jones*, 2 Rawle, 11; *Newcomb v. Agan*, 2 Johns. 421, n.; *Jackson v. Brownell*, 1 Johns. 267; *Hurd v. Darling*, 14 Vt. 214; *Manwell v. Manwell*, *ib.* 14; *Burns v. Cooper*, 81 Pa. St. 426; *Lamberton v. Stouffer*, 55 *id.* 284; *Alwood v. Ruckman*, 21 Ill. 200; *Dixon v. Niccolls*, 39 *id.* 372; *Koob v. Ammann*, 6 Bradw. (Ill.) 160; *Hansen v. Dennison*, 7 *id.* 73; *Wells v. Preston*, 25 Cal. 59, 67; *Ross v. Swaringen*, 9 Ired. 481; *Hatchell v. Kimbrough*, 4 Jones, 163; *Blake v. Coats*, 3 Iowa, 548; *Hoskins v. Rhodes*, 1 Gill & J. 266; and have even held the agreement to "deliver" the landlord's part of crop evidence of a demise: *Rinehart v. Olwine*, 5 W. & S. 157, 163; *Ream v. Harnish*, 45 Pa. St. 379; *Blake v. Coats*, *supra*; *Symonds v. Hall*, 37 Me. 354; even though the landlord furnishes seed, stock, or farming implements: *Brown v. Jaquette*, 94 Pa. St. 113; *Redmon v. Bedford*, 80 Ky. 13; *Harrison v. Ricks*, *Warner v. Abbey*, and other cases, *supra*. But as this doctrine left the crop the lessee's until delivery, the lessor lost all specific right thereto. And to protect him the courts in some States were led to construe an agreement expressed as a lease, not to be a lease but a tenancy in common of the crop, wherever a division uncertain in amount was stipulated for: *Putnam v. Wise*, 1 Hill, 234; and see *Smyth v. Tankersly*, 20 Ala. 212; *Bernal v. Hovious*, 17 Cal. 541; *Lowe*

§ 25. **Evidence arising from Occupancy may be controlled.** — Nor will the relation of landlord and tenant be inferred from occupation, if the relative position of the parties to each other can, under the circumstances of the case, be referred to any other distinct cause.<sup>1</sup> As, for instance, between a vendor and

*v. Miller*, 3 Gratt. 205; *Aiken v. Smith*, 21 Vt. 172; *Scott v. Ramsey*, 82 Ind. 330; and it was implied that the same relation existed as to the land; and this was distinctly held in later cases: *Dinehart v. Wilson*, 15 Barb. 595; *Harrower v. Heath*, 19 *id.* 331. Where there are no clear terms of demise this is, undoubtedly, the relation of the parties. *Caswell v. Districh*, 15 Wend. 379; *Otis v. Thompson*, Hill & Den. 131; *Foot v. Colvin*, 3 Johns. 216; *Guest v. Opdyke*, 31 N. J. 552; *Fiquet v. Allison*, 12 Mich. 330; *De Mott v. Hagarman*, 8 Cow. 220. And where neither demise, rent, nor exclusive occupation is agreed upon, but services to be paid in part of the crop, the occupant is not even tenant in common, but a mere cropper, with no interest until division. *Walker v. Fitts*, 24 Pick. 191; *Chandler v. Thurston*, 10 *id.* 205; *Chase v. McDonnell*, 24 Ill. 236; *Maverick v. Lewis*, 3 McCord, 211; *Warner v. Hoisington*, 42 Vt. 94; *Huggins v. Wood*, 72 N. C. 856; *State v. Jewell*, 34 N. J. 239; *Adams v. McKesson*, 53 Pa. St. 81. But where either of these is found the sounder view seems to be that there is a lease of the land, and the relation of landlord and tenant arises; and the lessor will either be entitled to his share, as it comes into existence, by way of reservation, subject only to the tenant's right of possession for purpose of cultivation, — *Moulton v. Robinson*, 7 Fost. 550; *Hatch v. Hart*, 40 N. H. 98; *Jewell v. Woodman*, 59 *id.* 520; *Lewis v. Lyman*, 22 Pick. 437; *Kelly v. Weston*, 20 Me. 232; *Brown v. Lincoln*, 48 N. H. 168; *Wentworth v. R. R.*, 55 *id.* 540; *Johnson v. Hoffman*, 53 Mo. 509; *Heald v. Build. Ins. Co.*, 111 Mass. 38; and see *Ferrall v. Kent*, 4 Gill, 209; *Esdon v. Colburn*, 28 Vt. 631; *Smith v. Atkins*, 18 *id.* 461; *Willmarth v. Pratt*, 56 *id.* 474; *Atkins v. Womeldorf*, 53 Iowa, 150; *Sunrol v. Molloy*, 63 Cal. 369, — or, if the share is clearly rent, that the lessor has no interest therein before delivery, see cases *supra*, or until his share is set apart for him by the tenant, *Townsend v. Isenberger*, 45 Iowa, 670; *Thomas v. Williams*, 32 Hun, 257. Where the owner of a farm leased it to a tenant for a year under an oral agreement by which the lessee was to carry on the farm at the halves, and to leave at the end of the term as much hay as he found there at the beginning, and the lessor did not occupy the farm during the term, it was held that the court could not, as matter of law, say that the lessor had during the year such a potential interest in the crops as to enable him to mortgage them. *Orcutt v. Moore*, 134 Mass. 48.

<sup>1</sup> *Osgood v. Dewey*, 13 Johns. 240; *Curtis v. Treat*, 21 Me. 525. In *Constant v. Abell*, 26 Mo. 174, 181, where the government took possession of demised premises, and paid lessee rent, it was held that he was not liable to lessor for government's occupation after his term expired; for

vendee of land, where the purchaser is to have possession until the agreement for purchase is completed or rescinded; for possession was evidently taken in such case with the understanding of both parties that the occupant should be owner and not tenant; and the other party cannot, without his consent, convert him into a tenant, so as to charge him with rent.<sup>1</sup> But if the vendee remains in possession after

though he had received rent he had never let the government in. So the owner cannot hold as tenant one who took possession under a pretended sheriff's sale: *Nance v. Alexander*, 49 Ind. 516. So where a tenant for the life of another continued in possession without the consent of the owner, after the determination of the life-estate. *Livingston v. Tanner*, 4 Kern. 64; *Buck v. Binninger*, 3 Barb. 391; *Freeman v. Ogden*, 40 N. Y. 105.

<sup>1</sup> *Coffman v. Hack*, 24 Mo. 496; *Brown v. Persons*, 48 Ga. 60; *Ripley v. Yale*, 16 Vt. 257. The vendee's right is a bare right to occupy provisionally, no more than a license, determinable by mere demand; upon which ejectment lies without any notice to quit: *Doe v. Stanion*, 1 M. & W. 700; *Right v. Beard*, 13 East, 210; *Doe v. Chamberlaine*, 5 M. & W. 14; *Doe v. Edgar*, 2 Bing. (N. C.) 498; *Doe v. Miller*, 5 C. & P. 595; *Doe v. Jackson*, 1 B. & C. 448; *Jackson v. Deyo*, 3 Johns. 422; *Jackson v. Kingsley*, 17 *id.* 158; *Sprague v. Stone*, 20 Barb. 509; *Love v. Edmonstone*, 1 Ired. 152; *Kratemayer v. Brink*, 17 Ind. 509; *Richardson v. Thornton*, 7 Jones, 458; *Brewer v. Craig*, 3 Har. 214; even though he has paid a portion of the purchase-money: *Banks v. Rebbeck*, 2 Lowndes, M. & P. 452; *Doe v. Stanion*, 1 M. & W. 695; *Ball v. Cullimore*, 2 C. M. & R. 120. He is not estopped to deny the vendor's title: *Watkins v. Holman*, 16 Pet. 25; is not entitled to emblements: *Harris v. Frink*, 50 N. Y. 24; or fixtures: *King v. Johnson*, 7 Gray, 239; and neither use and occupation: *Rogers v. Wiggs*, 12 B. Mon. 504; *Benson v. Boteler*, 2 Gill, 74; *Ayer v. Hawkes*, 11 N. H. 148; *Sylvester v. Ralston*, 31 Barb. 286; *Thomson v. Bower*, 60 *id.* 463; *Fall v. Hazlerigg*, 45 Ind. 576; *Dunning v. Finson*, 46 Me. 546; *Kirtland v. Pounsett*, 2 Taunt. 145; *Hearn v. Tomlin*, Peake, 192; *Winterbottom v. Ingham*, 7 Q. B. 611; *Corrigan v. Woods, Jr.* R. 1 Com. L. 73; *McNair v. Schwarz*, 16 Ill. 24; *Greenup v. Vernor*, *ib.* 26; *Hadley v. Morrison*, 39 *id.* 392; nor landlord and tenant process lies: *Dakin v. Allen*, 8 Cush. 38; *Riley v. Jordan*, 75 N. C. 180; *Johnson v. Hanser*, 82 *id.* 375; *Dunham v. Townsend*, 110 Mass. 440; *Reeder v. Ball*, 7 Bush, 255; *Banks v. Rebbeck*, *supra*; *Burnett v. Scribner*, 16 Barb. 621. In the case of *Gould v. Thompson*, 4 Metc. 224, following *Hull v. Vaughan*, 6 Price, 157, the vendee was held liable in use and occupation; but this case seems contrary to the weight of authority. In *Towne v. Butterfield*, 97 Mass. 105, *Gould v. Thompson*, is cited as an authority, and a vendee so occupying held estopped to deny

such an agreement has been rescinded, though a tenant at will so strictly as to be subject to removal without notice, he is liable in use and occupation while he remains.<sup>1</sup> Nor can the relation of landlord and tenant exist where the occupant holds the position of trustee to the party entitled;<sup>2</sup> nor between a vendor and vendee where the vendor retains possession after the sale,<sup>3</sup> unless there has been a conveyance of the property, in which case the presumption will be that he is in rightfully, and as tenant to the grantee.<sup>4</sup> The same principle applies to the case of a mortgagor and mortgagee; and to

vendor's title. But in *Dunham v. Townsend*, *supra*, both these cases are referred to as relating to the period after a rescission. In *White v. Livingston*, 10 Cush. 259, the vendee had an agreement for peaceable possession so long as he paid interest on his purchase-note, "which both parties treated as rent," and this was held to be a lease. This is undoubtedly correct where the money is paid as compensation for the land. *Saunders v. Musgrove*, 6 B. & C. 524; *Graham v. Way*, 38 Vt. 19. See, however, *Davis v. Hemmenway*, 1 Wms. Vt. 589. But in the former case it was interest only; and the payment of interest on his purchase-money by the vendee does not make him a tenant: *Doe v. Stanion*, 1 M. & W. 695; *Doe v. Edgar*, 2 Bing. N. C. 498; *Banks v. Rebbeck*, *supra*; and in *Dakin v. Allen*, 8 Cush. 33, where the vendee had a verbal agreement to retain possession until the payment of a note for five years with interest, he was held not a tenant, — Shaw, C. J., saying, "he was to pay a sum of interest semi-annually, not for the use of the land grounded on the estimated value of such use, but as forbearance for payment of a sum of money for which he had given his note." So *Dunham v. Townsend*, *supra*; and see *Dolittle v. Eddy*, 7 Barb. 74. Where, however, a vendee is already in as tenant, his possession is to be referred to that, and not to his intended purchase. *Blanchard v. McDougal*, 6 Wisc. 167. Where he agrees to pay a stipulated rent at the end of the year, if he shall fail to pay the purchase-money, he is liable as tenant. *Vick v. Ayres*, 56 Miss. 670. *Aliter*, if the conveyance is defeated by the vendor's fault. *Garvin v. Jennerson*, 20 Kan. 371; *Lyon v. Cunningham*, 136 Mass. 532.

<sup>1</sup> *Dunham v. Townsend*, *supra*; *Dwight v. Cutler*, 3 Mich. 516; *McLaughlin v. Nash*, 14 Allen, 136, where it was also held that he was only entitled to fixtures as between vendor and vendee. So he becomes liable for use and occupation where the contract of sale was wholly void. *Mattox v. Hightshee*, 39 Ind. 95; *Howard v. Shaw*, 8 M. & W. 118.

<sup>2</sup> *Russell v. Erwin*, 38 Ala. 44; *McCreels v. Wallace*, 71 N. C. 587.

<sup>3</sup> *Tew v. Jones*, 13 M. & W. 12; *Goldsberry v. Bishop*, 2 Duv. 143; *Currier v. Earl*, 18 Me. 216; *McCreels v. Wallace*, *supra*; *Jackson v. Aldrich*, 13 Johns. 106; *Mott v. Coddington*, 1 Rob. N. Y. 237.

<sup>4</sup> *Sherburne v. Ives*, 20 Mo. 70.

that of the tenant of a mortgagor by a demise subsequent to the mortgage, and the mortgagee or his assignee; for no privity of estate exists between them in either case.<sup>1</sup> So with respect to the guardian or trustee of an infant, or to a husband seised in right of his wife; neither of these persons, holding over after the determination of their respective estates, become tenants in any sense; they are mere intruders and trespassers.<sup>2</sup> And, as a general rule, it may be stated that a tenancy by implication can never arise under a party who has not the legal estate of the premises in question.<sup>3</sup>

## SECTION II.

### BY AN EXPRESS AGREEMENT.

§ 26. **Leases by Parol or Deed.** — When a tenancy is created by an express agreement between parties, it is either by *parol* or by *deed*. The former mode embraces all cases where the parties agree by mere word of mouth or by a writing not under seal. No particular form of expression is necessary, in either case, to create an immediate demise; but a reservation of rent, in some form, or some admission of allegiance to the title are characteristic of a contract by which the relation of landlord and tenant is created. Any permissive

<sup>1</sup> Way v. Raymond, 16 Vt. 371.

<sup>2</sup> Jackson v. Rowland, 6 Wend. 666; and see Roach v. Cozine, 9 id. 231; Carlisle v. McCall, 1 Hilt. 399; for by the common law whoever came in by act of law and held over, as in case of a guardian, husband, or trustee, became a mere trespasser, *supra*; but he who entered by act of the party entitled to the estate and held over was tenant at sufferance. Such was the case of a tenant *pur autre vie*. Allen v. Hill, Cro. El. 238; Torrey v. Torrey, 14 N. Y. 430; Horsey v. Horsey, 4 Harr. 517. Thus in Whitney v. Dart. 117 Mass. 153, the husband of the grantee in fee subject to the grantor's life-estate, who had entered and occupied under the life tenant, was held not the tenant of his wife's lessee, after the life-estate ended. See also Wills v. Wills, 34 Ind. 106; Chamberlain v. Dunshee, 45 Vt. 50.

<sup>3</sup> Morgell v. Paul, 2 Mann. & R. 303. When it appears upon the face of the instrument that the party intending to demise has no power to demise, the instrument is not a lease. Hayward v. Haswell, 6 A. & E. 265.

holding is sufficient for the purpose, and may be contained in a series of letters, or in a brief memorandum of the contracting parties.<sup>1</sup> And any phraseology will establish the fact from which it appears to have been the intention of one of the parties voluntarily to dispossess himself of the premises, and of the other to assume the possession, for any determinate period, whether the words made use of run in the form of a license, a covenant, or an express agreement.<sup>2</sup>

§ 27. **Parol Leases for Years valid at Common Law.** — Leases for years being considered mere chattel interests, arising out of a contract between the parties, passing only a transient interest in the land, and not a freehold, might originally, at common law, have been made by parol for any certain period. The contract gave the lessee a right to enter upon the land with a present interest; and when, in pursuance of such right, he entered, the object of the contract was accomplished, the *term* vested in the lessee, the *seisin* in the land still remaining in the freeholder. But as the tenant was never technically seised, and held only in the name of his lord, he could not

<sup>1</sup> *Lindsley v. Tibbals*, 40 Conn. 522; *Shaw v. Farnsworth*, 108 Mass. 357; *Johnson v. Phoenix Mut. Life Ins. Co.* 46 Conn. 92; *Alcorn v. Morgan*, 77 Ind. 184.

<sup>2</sup> *Moshier v. Reding*, 3 Fairf. 478; *Maverick v. Lewis*, 3 McCord, 211; *Caswell v. Districh*, 15 Wend. 879; *Right v. Proctor*, 4 Burr. 2208; *Chapman v. Bluck*, 5 Scott, 531; *Waller v. Morgan*, 18 Ky. 142. A receipted bill of sale of hay and oats had a memorandum: "Left at stable on O. street where P. takes possession. Rent to begin October 1, 1870, for one year at \$150." Signed and dated. This was held a lease, and parol evidence admissible to identify and describe the premises and prove occupation. *Eastman v. Perkins*, 111 Mass. 30. So a receipt for \$10 "from C. on rent of store on corner of Z. (No. 22) and C. streets, which C. is to have for \$100 a month until May, 1873," dated and signed. *Remington v. Casey*, 71 Ill. 317. See also *Smith v. Simmons*, 1 Root, 318; *Munson v. Wray*, 7 Blackf. 403; *Mun'y No. 1 v. N. Orleans*, 5 La. Ann. 761; *Bacon v. Bowdoin*, 22 Pick. 401; *People v. Kelsey*, 14 Abb. Pr. 372. But a mere authority from the owner of land to another to occupy, not accompanied by anything showing a contract for possession on one side and for a recompense to be paid on the other, is not a lease, nor does it convey any estate or interest in the land. *Branch v. Doane*, 17 Conn. 411. The State grant of a franchise for a limited time, after which it is to revert to the State, is no lease. *Bridge v. Prop'rs*, 1 Zab. 384.



defend himself in a real action; and was also liable to be dispossessed at the pleasure of the tenant of the freehold, by his suffering a common recovery.<sup>1</sup> So precarious an interest in the tenant was soon found to be prejudicial to agriculture; forasmuch as there was no encouragement for a tenant to improve and cultivate the land in a proper manner, his principal inducement to take a lease. His interest was rendered less insecure by a change in the law near the end of the reign of Henry VI.,<sup>2</sup> which gave him a right to recover, when unduly evicted, not only damages for the loss of his possession, but the possession itself. The term, however, became a certain interest by 21 Hen. VIII., which enabled a lessee for years to entirely falsify a recovery to his prejudice under such circumstances; and a variety of subsequent enactments increased its security and permanence.

§ 28. **Rule changed by Statute of Frauds.**—The statute of 29 Car. II. c. 3, which is usually called the Statute of Frauds, first enacted, as a remedy for many evils arising from parol demises, that all leases, estates, or terms of years, or any uncertain interest in land, created by livery only, or by parol, and not reduced to writing and signed by the party making the same, or his agent, should have no other force or effect than a mere estate at will; excepting leases for a term not exceeding three years, whereupon the rent reserved shall amount to two thirds of the full improved value of the premises.<sup>3</sup> The leading provisions of this statute have with some

<sup>1</sup> Co. Lit. 46, a; Theobals v. Duffoy, 9 Mod. 102; Shep. Touch. 210.

<sup>2</sup> Poole v. Errington, 1 Ad. & E. 756, where it is said to have been a judicial change between 6 Rich. II. (A. D. 1383) and 7 Edw. IV. (A. D. 1468). Smith, Landl. & T. 11, says between 1455 and 1458, referring to 33 Hen. VI. fol. 42 (A. D. 1455), to show that it had not then occurred.

<sup>3</sup> By the 8 & 9 Vict. c. 106, §§ 2, 3, such writing must be under seal. Similarly statutory provisions exist in Vermont, Rhode Island and Delaware applicable to all leases over one year in point of duration. It must appear also that the rent was two thirds the improved value; which is here held to mean the annual value. This requirement also exists in New Jersey. Gano v. Vandever, 34 N. J. 293, though the meaning given to *improved value* is total value and not annual. In Maryland such a value is presumed in the absence of evidence to the contrary. Union Bk. v. Gittings, 45 Md. 180.



exceptions been adopted in the United States. Thus in New York no lease or contract for leasing for more than a year is good except in writing, signed by the party or his agent, who in the former case must be authorized in writing.<sup>1</sup>

§ 29. *How limited in different States.* — In Massachusetts, all estates and interests in land created without writing, whether an annual rent is reserved or not, are declared by statute to be estates at will only.<sup>2</sup> So in Missouri, Ohio, Maine, Vermont, and New Hampshire. In Connecticut, no leases of land for a term exceeding a year are valid, except as against the grantor, unless they be made in writing, and are signed by the lessor in the presence of two witnesses, and acknowledged. Pennsylvania, Indiana, and North Carolina partially follow the English statute, and allow parol leases, not exceeding three years, without adding anything as to the reservation of rent, or other consideration for the making of the contract. In New Jersey, Maryland, and South Carolina,

<sup>1</sup> 2 R. S. 135, § 8. In some of the States, the words "authorized by writing" are omitted; in which case it is sufficient that the agent have verbal authority to contract, provided the contract itself is in writing; but his authority to make a deed must still be in writing. Story on Agency, § 50; and see *McWhorter v. McMahan*, 10 Paige, 394; *Champ- lin v. Parish*, 11 *id.* 405; *Agate v. Gignoux*, 1 Rob. N. Y. 278; *Benedict v. Beebee*, 11 Johns. 145; *Lower v. Winters*, 7 Cow. 263. In Indiana, a parol lease for an indefinite time, the tenant taking possession, is a tenancy from year to year, and not within the Statute of Frauds. See 2 R. S. 1876, p. 388, § 2, and *Swan v. Clark*, 80 Ind. 57. In *McMullen v. Riley*, 6 Gray, 500, an oral agreement to hire and pay landlord for fitting up premises was held to give no action for such fitting up, though actually done. So landlord's agreement to repair, in consideration of which tenant enters, occupies and pays rent, is within the statute. *O'Leary v. Delany*, 63 Me. 584. But where the tenant builds or repairs, on the promise of a lease to which the statute is set up as a bar, he may recover the value of such work. *White v. Wieland*, 109 Mass. 291; *Parker v. Tainter*, 123 *id.* 185; *Pulbrook v. Lawes*, 1 L. R. Q. B. Div. 284. But making improvements, or advance payment of rents under a parol contract for a lease for more than a year, cannot in law or equity, extend the tenancy beyond the year. *Brockway v. Thomas*, 36 Ark. 518; *Beck v. Birdsall*, 19 Kan. 550; *Railsback v. Walker*, 81 Ind. 409; *Creighton v. Sanders*, 89 Ill. 543.

<sup>2</sup> Pub. Sts. c. 120, § 3; *Ellis v. Paige*, 1 Pick. 43.

the English statute is followed ; but in other States the principles of the New York statute have been adopted.<sup>1</sup>

§ 30. **Agreements to lease under Statute of Frauds.** — By the English Statute of Frauds also, every agreement not in writing and signed by the party to be charged therewith, or his authorized agent, is void, which, by its terms, is not to be performed within one year from the making thereof. A verbal agreement to lease lands must therefore, according to the English authorities, commence from the making of the agreement, and cannot be made to commence from a future day.<sup>2</sup> In most of the United States similar statutory provisions exist.<sup>3</sup> In those

<sup>1</sup> In Alabama, Arkansas, California, Delaware, Florida, Illinois, Iowa, Kentucky, Michigan, Mississippi, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin, parol leases for one year are valid. Browne, Stat. Fr. Appendix. The effect of the statute is limited to the contract. If possession is taken and held under it, the tenant becomes from year to year; the terms of the contract controlling *prima facie*. *Drake v. Newton*, 3 Zab. 111 ; *Lounsberry v. Snyder*, 31 N. Y. 514; and see *post*, § 58.

<sup>2</sup> *Rawlins v. Turner*, 1 Ld. Ray., 736; *Anon.* 12 Mod. 610. An executory agreement for a lease does not satisfy the Statute of Frauds unless it can be collected from it on what day the term is to begin ; and there is no inference that the term is to run from the date of the agreement in the absence of language in the agreement pointing to that conclusion. *Marshall v. Berridge*, 19 Ch. D. 233, overruling *Jaques v. Miller*, 6 *id.* 153.

<sup>3</sup> *Delano v. Montague*, 4 Cush. 42; *Kelley v. Terrell*, 26 Ga. 551; *Larkin v. Avery*, 23 Conn. 304; *Stackberger v. Mosteller*, 4 Ind. 461; and see Browne St. Fr. App. So in Georgia, Code, 2280. And part performance, as by entry and payment, will take the case out of the operation of the Statute of Frauds, Code, 1951. See *Steininger v. Williams*, 63 Ga. 475. But the Revised Statutes of New York have omitted the expression, *within one year from the making thereof*, which was held to prohibit the creation of an estate for a year commencing *in futuro*, and the Court of Appeals, in that State, now hold that a parol lease of lands for the term of one year, to commence at a period subsequent to the day when the contract was made, is valid, for that the time between the making of the lease and its commencement in possession is no part of the *term* granted: *Young v. Dake*, 5 N. Y. 463 ; *Becar v. Flues*, 64 *id.* 518; and the cases of *Lickwood v. Barnes*, 3 Hill, 128, and *Plimpton v. Curtis*, 15 Wend. 336, are overruled. A parol contract, to give a lease of land for a term exceeding one year, is void. *Phipps v. Ingraham*, 41 Miss. 256 ; *Shepherd v. Cummings*, 1 Coldw. 354. An agreement to occupy lodgings at a yearly rent, payable in quarterly portions, when the occupation

States where the exception of leases not exceeding three years is made, the limitations of contracts to a year provided by the fourth section of the English statute are held not to apply.<sup>1</sup>

§ 31. **Parol Licenses valid.** — Every grant of the possession of land for permanent use is an interest within the meaning of the statute, whether it be to enter upon it at all times without fresh consent, or for the purpose of erecting and keeping a house in repair, making an embankment, or canal, in order to raise water to work a mill, or the like; and an agreement therefor must consequently be in writing. But a license or authority to enter upon the land of another, to do certain specified acts, which are of a temporary character, without intending to pass an interest in the land, is founded in personal confidence; and although revocable so long as it remains unexecuted, is valid notwithstanding it is not in writing.<sup>2</sup> The conferring of a right to enter upon lands, and to erect and maintain a dam as long as there shall be employment for the water-power thus created, is, however, more than a license: it is the transfer of an interest in land in the nature of a lease, and must therefore be in writing.<sup>3</sup>

§ 32. **Parol Agreements to Lease, when enforced in Equity.** — Although a parol agreement to grant a lease may be void under the statute, it will still be enforced in equity when there has been a substantial part performance of it, though on the part of the plaintiff only;<sup>4</sup> and a specific performance will,

is to commence at a future day, is an agreement relating to an interest in land, within the meaning of the Statute of Frauds, and must therefore be in writing. *Inman v. Stamp*, 1 Stark. 12. A mere executory parol lease is wholly void. *Larkin v. Avery*, *supra*.

<sup>1</sup> *Huffman v. Starkes*, 31 Ind. 474; *Union Bk. v. Gittings*, 45 Md. 180; *Birckhead v. Cummings*, 33 N. J. 44; controverting *Inman v. Stamp*, *supra*; *Edge v. Strafford*, 1 C. & J. 391.

<sup>2</sup> *Cook v. Stearns*, 11 Mass. 533; *Phillips v. Thomson*, 1 Johns. Ch. 131; *Miller v. Auburn & Sy. R. R.*, 6 Hill, 61; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Woodward v. Parshley*, 7 N. H. 237; *Sampson v. Burnside*, 13 *id.* 264; *Dubois v. Kelley*, 10 Barb. 496.

<sup>3</sup> *Mumford v. Whitney*, 15 Wend. 380.

<sup>4</sup> *Jackson v. Pierce*, 2 Johns. 221; *Hollis v. Whiting*, 1 Vern. 151; *Walker v. Walker*, 2 Atk. 98; *Beidelman v. Foulk*, 5 Watta, 308. A

under these circumstances, be decreed, if signed by one party only.<sup>1</sup> If possession has been delivered under such an agreement, it will be considered as a part performance;<sup>2</sup> especially if the tenant has expended money in building or improving the property, in pursuance of it.<sup>3</sup> But acts which are merely introductory, or ancillary to an agreement, will not be considered as a part performance, although attended with expense.<sup>4</sup> And possession must also be voluntarily delivered in part performance; for, if the purchaser obtains it wrongfully, it will not avail him.<sup>5</sup> Nor will a possession which can be referred to another title distinct from the agreement take a case out of the statute, and therefore no possession of this character by an occupant can be deemed a part performance.<sup>6</sup>

§ 33. **Substantial Performance, what. — Party's Representatives bound by Decree.** — The acceptance of a trifling earnest, or the payment of money on account of the agreement, though it may make a personal contract good, is not enough to satisfy the statute where the contract concerns lands.<sup>7</sup> Even the

parol lease for more than a year, but less than three, which by the statute of Ohio, is required to be in writing will be withdrawn from the operation of the statute, and become valid for the term specified, if the lessee takes possession and has paid rent according to the terms of the lease. *Grant v. Ramsey*, 7 Ohio St. 165. So also in Pennsylvania, *Jones v. Peterman*, 3 S. & R. 543; quoting *Earl of Aylesford's case*, 2 Stra. 783.

<sup>1</sup> *Owen v. Davis*, 1 Ves. Sr. 82; *Seton v. Slade*, 7 Ves. 265; *Martin v. Smith*, L. R. 9 Exch. 50; *Parker v. Taswell*, 2 De G. & J. 559. See the subject of the specific performance of an agreement, treated more at large, in section three of this chapter. And see § 36.

<sup>2</sup> *Moore v. Beasley*, 3 Ham. 294; *Butcher v. Stapely*, 1 Vern. 363; *Aston v. Aston*, 2 *id.* 452; *Bowers v. Cator*, 4 Ves. 91.

<sup>3</sup> *Lester v. Foxcraft*, Colles, Parl. Ca. 108; *Floyd v. Buckland*, 2 Freem. 268; *Mortimer v. Orchard*, 2 Ves. 243; *Carter v. Boehm*, 3 Burr. 1919. In *Foster v. Hale*, 3 Ves. 712, the court said it had gone too far in taking cases out of the statute; for a man having laid out a vast deal of money does not prove that he is to have a ninety-nine years' lease. The remedy ought to rest in compensation.

<sup>4</sup> *Clarke v. Wright*, 2 Atk. 12; *Whitbread v. Brockhurst*, 1 Bro. C. C. 412; *Cooke v. Toombs*, 2 Anst. 420; *Cooth v. Jackson*, 6 Ves. 12.

<sup>5</sup> *Cole v. White*, 1 Bro. C. C. 409.

<sup>6</sup> *Wills v. Strading*, 3 Ves. 378.

<sup>7</sup> *Alsopp v. Patten*, 1 Vern. 472; *Coles v. Trecothick*, 9 Ves. 234.

payment of a considerable sum of money, or the performance of sundry acts bearing upon the transaction, will not be considered part performance of such a contract, unless they clearly appear to have been paid or done solely with a view to the performance of the agreement.<sup>1</sup> And although an agreement may have been performed in part, yet the court, it seems, may not be able to understand its terms, and then the case will not be taken out of the statute.<sup>2</sup> But the mere circumstance that the terms do not clearly appear, or that they are controverted by the parties, will not deter the court from taking the best means in its power to ascertain the real terms of the contract, and to enforce it, when it can be made intelligible.<sup>3</sup> And if the agreement is so far executed as to entitle either of the parties to require a specific performance, it will be binding on the legal representatives of the other party in case of his death, to the same extent that he was himself bound by it.<sup>4</sup>

§ 34. **Livery of Seisin abolished. — Seal. —** The common law required that a freehold should be conveyed either by deed or by livery of seisin without writing. The English Statute of Frauds abolished the latter method, and left the former as the only mode of conveyance; and this provision of law, with some modifications, generally prevails in this country. The statutes of many of the States require the conveyance of all freeholds to be by deed;<sup>5</sup> and in other States leases exceeding a certain number of years must also be by deed.<sup>6</sup> And where the conveyance of a freehold is not required by statute to be under seal, it has, unless where specially dispensed with by

<sup>1</sup> *Clinan v. Cook*, 1 Sch. & L. 22; *Butcher v. Butcher*, 9 Ves. 382; *Rosenthal v. Freeburger*, 26 Md. 80.

<sup>2</sup> *Forster v. Hale*, 3 Ves. 712.

<sup>3</sup> *Mortimer v. Orchard*, 2 Ves. 243; *Boardman v. Mostyn*, 6 *id.* 470; *Allan v. Bower*, 3 Bro. C. C. 149.

<sup>4</sup> *Ib.*; *Shannon v. Bradstreet*, 1 Sch. & L. 52.

<sup>5</sup> Thus Mass. Pub. Sts. c. 120, § 4; Vt. Comp. Sts. 1850, c. 67, § 3, South Carolina, and others.

<sup>6</sup> Thus in Massachusetts and Maryland seven years, in Virginia five, in Florida, two, in Delaware, Rhode Island, and Vermont, one year.

statute, as in Alabama, Kentucky, and Louisiana,<sup>1</sup> been held necessary by common law.<sup>2</sup> For this reason, an agreement, not under seal, that a lessor should not turn out the tenant so long as he paid rent, has been held invalid; because the tenancy created by it would not be determinable so long as the tenant complied with the terms of his agreement, and would, therefore, operate as an estate for life, which, being a freehold, can only pass by deed.<sup>3</sup>

**35. Sufficient Signature, what.** — As to what is a sufficient signature to the agreement, required by statute, it is held to be unnecessary that it should be done contemporaneously with the making of the agreement; it is sufficient if made by the parties at one time and adopted at another; and then anything under the hand of the party to be charged, which amounts to an acknowledgment that he had entered into

<sup>1</sup> Ala. Code, 1852, § 2193; Ky. R. S. 1852, c. 22, § 2; 4 Kent, Com. 443. In Missouri, a lease need not be under seal. *Gay v. Ihm*, 3 Mo. App. 588.

<sup>2</sup> *Den v. Johnson*, 3 Green, N. J. 116, where it was contended that as by the Statute of Frauds all estates not in writing were at will, except certain short leases, all other transfers of interests in land, whether for years or freehold, were by implication alike, and either freeholds were conveyable in writing or estates for years must be created by deed. But it was held after an elaborate discussion that the statute was to be construed negatively and not affirmatively, and merely substituted written for verbal transfers of land where these were allowed at common law, but did not alter other established modes of conveyance. So *Allen v. Jaquish*, 21 Wend. 628. A lease for lives, to begin from the day of the date hereof, with seisin delivered afterwards, is good, and shall not be said to convey a freehold to commence in future. *Freeman d. Vernon v. West*, 2 Wils. 165.

<sup>3</sup> *Doe v. Browne*, 8 East, 165. By the English statute, 8 & 9 Vict. c. 106, all leases required by law to be in writing must be made by deed; and the same rule applies to assignments and surrenders of such leases. A demise of an incorporeal hereditament can only be valid by deed; a demise by parol of a right of hunting and sporting, together with a messuage, is therefore void. *Bird v. Higginson*, 6 A. & E. 824. But an instrument not under seal by which land is demised, and which also attempts to demise incorporeal tenements, is not entirely void by reason of such an attempt. *Regina v. Hockworthy*, 7 A. & E. 492. It is considered doubtful whether or not a lease under seal can be cancelled and surrendered by a writing not under seal. *Roe v. Conway*, 74 N. Y. 201.

the agreement, will satisfy the statute. As where a person verbally agreed to take a lease for fifteen years, and it was subsequently made out and sent to him for signature; he returned it, and wrote on the back of the lease: "I hereby request you to endeavor to let the premises to some other person, as it will be inconvenient for me to perform my agreement for them, and for so doing this shall be a sufficient authority." This was held a clear recognition of an existing contract, sufficiently reduced to writing to bind him.<sup>1</sup> But the fact that a party has altered the draft of a conveyance, and delivered it to an attorney to be engrossed, does not amount to signing it.<sup>2</sup> Nor is the statute complied with, unless the agreement is likewise signed by him, though it may have been written with his own hand; because the absence of a signature is evidence that the party considered the instrument to be incomplete.<sup>3</sup> The signature may be written with a lead pencil, or in ink, at the discretion of the parties; and if he is in the habit of printing, instead of writing his name, he may be said to sign by his printed as well as by his written name if he intends it as his signature.<sup>4</sup> And the name of the

<sup>1</sup> *Shippey v. Derrison*, 5 Esp. 190; *Powell v. Dillon*, 2 Ball & B. 416. So where a memorandum of agreement for a lease was signed by the lessee, but the name of the lessor did not appear in any part of the memorandum, it was held that a letter written by the lessee subsequently, referring to the lessor by name, was sufficient to satisfy the statute. *Warner v. Willington*, 3 Drew. 523; 2 Jur. n. s. 433.

<sup>2</sup> *Hawkins v. Holmes*, 1 P. Wms. 770; *Lowther v. Carill*, 1 Vern. 221. Nor will the mere fact of the name of the party being written by himself in the body of the instrument constitute a signature within the meaning of the statute. *Stokes v. Moore*, 1 Cox, 219. But where a lessee wrote a lease containing his own name in the third person, recorded it, and entered and paid rent, these acts were held to show his intent to execute the lease, and to take the case out of the operation of the Statute of Frauds, without further signature. *Traylor v. Cabanné*, 8 Mo. App. 131. For a case in which it was held that the lessee's signature was not necessary to bind him, — the lease reciting that the lessee was to pay a certain rent, and the lessee having accepted the lease and being thus held as an original promisor or obligor, — see *McFarlane v. Williams*, 107 Ill. 33.

<sup>3</sup> *Charlewood v. Bedford*, 1 Atk. 497; *Anderson v. Harold*, 10 Ohio, 399; *Bailey v. Ogden*, 3 Johns. 399.

<sup>4</sup> Per *Ld. Eldon*, in 2 B. & P. 239; *Schneider v. Norris*, 2 M. & S. 286. *Clason v. Bailey*, 14 Johns. 484.



party may be put to an instrument by his direction, by the hand of another person, if it be done in his presence,<sup>1</sup> or by his broker or agent duly authorized.<sup>2</sup> So if the agreement itself is not signed, but a letter referring to it has been written, acknowledging the agreement, this has been held sufficient for the purposes of the statute.<sup>3</sup> The contract, in whatever shape it exists, should properly be signed by both parties, or it may be void for want of mutuality.<sup>4</sup>

§ 36. **Place of Signing.** — At common law the place of signing is immaterial; for if a person writes his name in any part of the agreement, it will be considered his signature, if it was written for the purpose of giving authenticity to the instrument.<sup>5</sup> As where a man drew up an agreement in his own handwriting, beginning, "I, A. B., agree," &c., and left a place for his signature, but did not sign it, the agreement was considered sufficiently signed. For, as a general rule, wherever an agreement has been reduced to a certainty, and the statute has been substantially complied with, strict matters of form are not to be insisted on.<sup>6</sup> Upon this principle it was held that the signing of an agreement in the place where a witness usually signs his name, by one who was acquainted with the contents of the instrument, was sufficient.<sup>7</sup>

<sup>1</sup> *Frost v. Deering*, 21 Me. 156; *Raymar v. Clarkson*, 1 Phillim. 422.

<sup>2</sup> *Clason v. Bailey*, *supra*.

<sup>3</sup> *Sanderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennet*, 3 Taunt. 169; *De Beil v. Thomson*, 3 Beav. 469. The letter may be sent to the plaintiff, or the acknowledgment may be contained in a letter sent to a third person. *Welford v. Beazeley*, 3 Atk. 503. And see *Dobell v. Hutchinson*, 3 Ad. & E. 355.

<sup>4</sup> *Cammeyer v. United Germ. Luth. Ch.*, 2 Sandf. Ch. 186, 249; *Miller v. Pelletier*, 4 Edw. 102; citing 10 Paige, 386; 26 Wend. 341. But in Michigan it seems that usage permits a lease to be executed by the exchange of duplicates, each of which is signed only by the other party. *Campbell v. Lafferty*, 43 Mich. 429.

<sup>5</sup> *Penniman v. Hartshorn*, 13 Mass. 87; *Knight v. Crockford*, 1 Esp. 190. See, also, *Bluck v. Gompertz*, 7 Exch. 862.

<sup>6</sup> *Knight v. Crockford*; *Penniman v. Hartshorn*, *supra*. It is held that a lease made to a railroad, by name, is binding, although there be no corporation of that name, if it appear that, at the time of execution, the road was owned by a private person who operated it under the name employed in the lease. *Ecker v. C. B. & Q. R. R. Co.* 8 Mo. App. 223.

<sup>7</sup> *Welford v. Beazeley*, 3 Atk. 503.



But the Revised Statutes of New York require the name of the party to be *subscribed* or signed below, that is, at the foot of the memorandum; what, therefore, under the old statute was deemed to be a sufficient signing of an agreement, is not now a compliance with the statute of that State requiring a subscription.<sup>1</sup> It was formerly doubted whether an agreement could be specifically enforced against a defendant who had signed it, when it did not appear to have been signed by the party seeking performance;<sup>2</sup> but it seems now to be well understood that wherever there is a mutual obligation, it will not only be enforced in equity, but may also be the foundation of an action at law.<sup>3</sup>

### SECTION III.

#### OF AN AGREEMENT FOR A LEASE.

§ 37. **How distinguished from a Lease.**—It sometimes becomes difficult to distinguish, in the form of a written instrument, between language importing an actual lease, and that which amounts to no more than an agreement to give one. This distinction is nevertheless important to both parties, for it may happen that what was intended by the one to be merely an agreement for a lease may be construed into a present lease, passing an estate in the land, and the other may thereby avoid covenants which would have been imposed upon him, if a regular lease had been executed. While its importance to the lessee appears from the consideration that, on the execution of an actual lease, he acquires an interest, — an *interesse termini*, — which, upon entry, vests the term in him; but, by an agreement only, he will acquire no legal interest in the term or in the land, nor can he set it up as a

<sup>1</sup> Davis v. Shields, 26 Wend. 341.

<sup>2</sup> Per Ld. Redesdale, in Lawrenson v. Butler, 1 Sch. & L. 13.

<sup>3</sup> Allen v. Bennet, 3 Taunt. 176; Bourke v. Rothwell, 2 Ball & B. 56; Martin v. Mitchell, 2 Jac. & Walk. 427; Laythoarp v. Bryant, 2 Bing. (N. C.) 735; Clason v. Bailey, 14 Johns. 484; McCrea v. Purmort, 16 Wend. 460; Penniman v. Hartshorn, *supra*.

defence to an action of ejectment brought against him. Such an agreement, however, will operate as a license to enter upon the premises agreed to be demised; and if the intended landlord refuses to grant the lease, it gives the proposed tenant a right to file a bill in equity, to enforce a specific performance of the agreement, or to maintain an action for damages, if any damage has resulted from his refusal to perform the agreement.<sup>1</sup> The difficulty of drawing the distinction between a present lease and a mere agreement to give a lease has led to so much litigation in England as to call for an Act of Parliament, providing that no lease in writing of any freehold, copyhold, or leasehold land shall be valid as a lease, unless it be made by deed; but that any agreement in writing, to let such land, shall be valid, and take effect as an agreement to execute a lease. Any person, however, who may be in possession of land, in pursuance of an agreement to let, may, by the payment of rent or other circumstances, become a tenant from year to year.<sup>2</sup>

§ 38. **Intention of the Parties governs the Construction.** — As the law stands with us, the whole question resolves itself into one of construction; and an instrument will be considered a lease, or only an agreement for a lease, according to what appears to have been the paramount intention of the parties; as such intent may be collected from the whole tenor and effect of the instrument.<sup>3</sup> And the law, it is said, will even

<sup>1</sup> Price v. Williams, 1 M. & W. 6.

<sup>2</sup> Stat. 7 & 8 Vict. c. 76, § 4. Under this statute it has been held that, although the agreement not under seal did not operate as a demise, yet by a collateral contract to the intended demise, the lessee became bound for rent notwithstanding that he had never entered into possession. Adams v. Hagger, 4 Q. B. D. 480. Since the Judicature Acts it is no longer the rule that a person holding under an executory agreement for a lease is only made a tenant from year to year by paying rent, but he is to be treated as holding by the terms of the agreement. And so such a tenant was held subject to the same right of distress as if a lease had been granted him. Walsh v. Lonsdale, 21 Ch. D. 9.

<sup>3</sup> Goodtitle v. Way, 1 T. R. 735; Bacon v. Bowdoin, 22 Pick. 401; State v. Page, 1 Spear, 408. An agreement containing words of bargain and sale *in præsenti*, does not necessarily transfer the title, but may be a mere agreement to convey. Jackson v. Myers, 3 Johns. 388; Jackson

do violence to the words, rather than break through the intent of the parties, by construing them into a lease, when the intention is manifestly otherwise.<sup>1</sup> An express provision that an instrument is not to operate as a lease, but only as an agreement for one, shows clearly the intention of the parties, notwithstanding any inference which might be drawn from other clauses in the same instrument,<sup>2</sup> but the mere use of the words *agree to let* is not of itself decisive.<sup>3</sup>

§ 39. **Words to create a Leasehold Interest.** — Words of present demise, as *doth let, agrees to let, agrees to pay for, doth demise, shall enjoy*, or the like, will generally make an actual lease, if no future or more formal document appears to have been intended; and especially if possession is taken under it.<sup>4</sup> But the use of such words, however strong, will not con-

*v. Clark, ib. 424; Ives v. Ives, 13 id. 235; Burnett v. Scribner, 16 Barb. 621.* And a contract reserving the right to quit at the end of ten years on paying the first instalment, is a sale and not a lease. *Moulton v. Norton, 5 Barb. 286.*

<sup>1</sup> *Hallett v. Wylie, 3 Johns. 44; Jackson v. Clark, ib. 424; Baxter v. Brown, 2 W. Bl. 973.*

<sup>2</sup> *Perring v. Brooke, 1 Mood. & R. 510.*

<sup>3</sup> *John v. Jenkins, 3 Tyrw. 177; Browne v. Warner, 14 Ves. 156; Weed v. Crocker, 18 Gray, 219.*

<sup>4</sup> *Averill v. Taylor, 8 N. Y. 44; Baxter v. Brown, 2 W. Bl. 973; Wright v. Trevezant, 3 C. & P. 441; Doe v. Groves, 15 East, 244; Jenkins v. Eldridge, 3 Story, 325; Hand v. Hall, 2 L. R. Exch. Div. 355; Doe v. Benjamin, 9 Ad. & E. 644.* The test seems to be that, if the agreement leaves nothing incomplete, it operates as a present demise. *Doe v. Ries, 8 Bing. 178.* The owner of land "agreed to rent and lease" it to a gas company, to store materials for the building they were about to erect on adjoining land, and at their request cleared his land of trees; held a lease, and that possession was taken under it. *Kabley v. Worc. Gas Co., 102 Mass. 392; citing Staniforth v. Fox, 7 Bing. 590.* A sealed instrument not specifying any term, but purporting to demise and lease from a future day, the lessee to pay taxes for a year, and waive notice to quit, was held to be a lease for years. *Barney v. Keith, 4 Wend. 502.* An agreement of the purchaser of land to allow the vendor to remain in possession for a year, and until the former should pay a certain mortgage, which, by its terms, had four years to run, was held to be a lease and not a reservation, and that the purchaser might pay, or tender the debt, within the year, and remove the vendor under the statute. *Hunt v. Comstock, 15 Wend. 665.* Where A. conveyed to B. realty by deed poll, reserv-

stitute the instrument a lease, if it can be clearly inferred from the rest of the paper that the parties had it in contemplation to enter into a future lease.<sup>1</sup> Thus an agreement containing words of present demise, but in which was inserted a stipulation on the part of the owner, to make certain alterations and improvements, and of the other party to take a lease, when the premises should have been so altered and improved, the term to commence from the day that the premises should be so altered and improved, was held to be only an agreement for a lease.<sup>2</sup> So an instrument containing words of present demise, with an agreement that the lessee *shall take possession immediately*, and that a lease shall be subsequently executed, operates only as an agreement for a lease.<sup>3</sup>

ing specified rents payable at stated times, and B. entered under the deed, it was held that, by entry, B. contracted to pay the rents as reserved, and that his contract, being implied and not express, was not within the Statute of Frauds, so that A. might maintain *assumpsit* for the rent due and unpaid. *Providence Christ. Un. v. Elliott*, 13 R. I. 74. Where the relation of the parties between the execution of the agreement and the execution of the lease cannot be any other than that of landlord and tenant, it is held to be a present demise. *Curling v. Mills*, 6 M. & G. 173. Though an agreement contains a stipulation for a future lease, and no precise day is fixed from which rent is to commence, still if it contains words of present demise, and the party is let into possession, it operates as a lease. *Doe v. Ries*, 8 Bing. 178; *Pearce v. Cheslyn*, 4 Ad. & E. 225; *Chapman v. Bluck*, 4 Bing. (N. C.) 187.

<sup>1</sup> *Jackson v. Moncrief*, 5 Wend. 26; *Tempest v. Rawling*, 13 East, 18. An instrument is not a demise, although it may contain the usual words of demise, if its contents show that such was not the intention of the parties. *Taylor v. Caldwell*, 3 B. & S. 826.

<sup>2</sup> *Jackson v. Delacroix*, 2 Wend. 433; *Poole v. Bentley*, 12 East, 168; *Colley v. Streeton*, 2 B. & C. 373.

<sup>3</sup> *Goodtitle v. Way*, 1 T. R. 75; *Morgan v. Bissell*, 3 Taunt. 65. Thus it was held to be an agreement in *McGrath v. Boston*, 103 Mass. 369, where repairs were to be done and a lease given; in *Griffin v. Knisely*, 75 Ill. 411, where the tenant was to receive a lease when his present holding ended; in *Brown v. N. Y. C. R. R.*, 44 N. Y. 79, where the covenants were not settled. The recent case of *Hand v. Hall*, 2 L. R. Exch. Div. 355, illustrates both propositions. Here A. "agreed to let" and B. "to take" premises, "for one year from next Lady Day" by an instrument dated Feb. 14, "with right at the end of the term for three and one-half years more on one month's notice;" which was held to be a lease for the year, and an agreement for the further period.

§ 40. **Conditional demise generally construed as an Agreement only.** — Wherever, therefore, the instrument makes the demise dependent on a condition or stipulation yet to be performed, it operates as an agreement only. Thus where a man agreed that another should *enjoy the mills, &c.*, and engaged to give him a lease for a certain time and at a certain rent; and, by another part of the same agreement, an additional piece of land was to be purchased by the former and added to the land demised; it was held that this amounted only to an agreement for a lease.<sup>1</sup> An agreement in these words: "It is hereby agreed, by and between A. and B., that A. will let to B. the use of the county house in L.; and B. agrees to pay therefor the sum of \$750 annually, provided a majority of the county court will agree thereto," is only an agreement to lease on a precedent condition.<sup>2</sup> So where the words of the agreement were, that A. *shall hold and enjoy*, and in a subsequent part of it the grantor engaged to give him a lease; the court held that, although the words *shall enjoy* might under ordinary circumstances constitute a present demise, yet they were qualified, by the subsequent engagement, into an agreement for a future lease.<sup>3</sup> And a written authority from one party to another to give a lease to a third person, on terms previously offered in writing by such third person, is not in itself a lease.<sup>4</sup>

§ 41. **But when Conditions are executed or Instrument so provides, may be a Lease.** — But where the preliminary stipula-

<sup>1</sup> Doe v. Ashburner, 5 T. R. 163; Dunk v. Hunter, 5 B. & A. 322; Clayton v. Burtenshaw, 5 B. & C. 41. A man agreed to repair a mill for another, for a certain sum to be paid when the work was finished, and the latter agreed to secure the premises to the former until the price was realized out of the profits. Held to be not a lease, but an agreement for a lease. People v. Gillis, 24 Wend. 201.

<sup>2</sup> Buell v. Cook, 4 Conn. 238. So where security is to be first given by the tenant. McGauntan v. Wilbur, 1 Cow. 257.

<sup>3</sup> Doe v. Ashburner, 5 T. R. 163; Colley v. Streeton, 2 B. & C. 273; Phillips v. Hartley, 3 C. & P. 121. So where lessor agreed to give a further term of five years, to begin thirty days after his death, and to provide for this in his will, it was held an agreement only. Weld v. Traip, 14 Gray, 330.

<sup>4</sup> Davis v. Thompson, 1 Shep. 209.

tions have been complied with<sup>1</sup> or where the instrument contains a clause, to the effect that it should be considered binding until a lease could be executed, it has been generally construed to be a present lease. So the words, *A. hath, and by these presents doth demise*, create a personal interest; and a subsequent agreement, to give a more formal lease, contained in the same instrument, was held to be only in the nature of a covenant for further assurance.<sup>2</sup> So where the instrument was as follows: "A. agrees to let, and B. to take, for the term of sixty-one years; and, in consideration of a lease to be granted by A. for the said term, B. agrees to expend £2,000 in building, &c.; A. to grant a lease as soon as the houses are covered in; this agreement to be considered binding until one fully prepared can be procured;" the court held it to be a lease, considering it to have been the intention of the parties that the tenant, who was to expend so much capital upon the premises, should have a present interest in the term, although, when a certain progress was made in the building, a more formal lease was to be executed, in which, perhaps, the premises might be more particularly described, for the convenience of underletting or assigning; and that the stipulation for a future lease did not, of itself, indicate an intention that the instrument should not operate as a present demise, but merely that a more formal instrument should thereafter be executed to effect the same thing, as being more satisfactory than the present instrument.<sup>3</sup> And generally, it may be said that, if there are words of present demise, without anything to indicate that the parties contemplate a further assurance, it is to be considered a lease.<sup>4</sup>

<sup>1</sup> *Shaw v. Farnsworth*, 108 Mass. 357. Here the tenant at will proposed to take a house for three years from a future day if the owner would put in a furnace, which the owner agreed to do, and did. Held a present demise, to commence *in futuro*. So *Holley v. Young*, 66 Me. 520; *Bussman v. Ganster*, 72 Pa. St. 285.

<sup>2</sup> *Jackson v. Kisselbrack*, 10 Johns. 336; *Barry v. Nugent*, 5 T. R. 165; *Doe v. Benjamin*, 9 Ad. & E. 644; *Alderman v. Neate*, 4 M. & W. 704.

<sup>3</sup> *Poole v. Bentley*, 12 East, 168; *Baxter v. Brown*, 2 W. Bl. 973; *Warman v. Faithfull*, 3 Nev. & M. 137; *Doe v. Groves*, 15 East, 244; *Pinero v. Judson*, 6 Bing. 206.

<sup>4</sup> *Hallett v. Wylie*, 3 Johns. 44; *Thornton v. Payne*, 5 *id.* 74; *Mickie*

§ 42. **To create Lease, Term and Rent must be certain.**— Certainty as to the time when the term is to commence, as well as to the period of its duration, and the amount of rent to be paid, is usually necessary to make an instrument operate as a present demise;<sup>1</sup> while uncertainty in these particulars will generally induce the courts to construe it as a mere agreement.<sup>2</sup> Thus where A. agreed “to let premises to B. on lease, with a purchasing clause, for twenty-one years, at £63 per year,” B. to enter at any time on or before a particular day, it was held to amount to an agreement only, the court saying there were no words of present demise, that the commencement of the tenancy was left uncertain, and that the words as to purchasing showed that the letting was to be by a particular instrument, containing such a clause.<sup>3</sup> So, where no price was fixed by the agreement, but it was left to the award of a third person not designated, this essential ingredient of a lease was said to be lacking.<sup>4</sup> The courts will sometimes, also, look at the contemporaneous acts of the parties, to assist in the construction of ambiguous words in such an agreement.<sup>5</sup> And strong circumstances of inconvenience may indicate the intention of the parties to be, that it shall only amount to an agreement; as that a forfeiture will

*v. Lawrence*, 5 Rand. 571; and see *Averill v. Taylor*, 8 N. Y. 44. An agreement to construct a wharf, which, when finished, is to be occupied by the grantee at a stipulated rent, accompanied by words of present demise, operates as a lease. *People v. Kelsey*, 14 Abb. Pr. 372.

<sup>1</sup> *Wright v. Trevezant*, 3 C. & P. 441; *Doe v. Ries*, 8 Bing. 178; *Warman v. Faithfull*, 3 Nev. & M. 137; *Dunk v. Hunter*, 5 B. & A. 322; *Clayton v. Burtenshaw*, 5 B. & C. 41; *John v. Jenkins*, 3 Tyrw. 170. A lease of land containing iron ore, for five years and such further time as the lessee might require to remove all the ore, and providing that the lessee should pay a certain sum for each ton of ore removed, and should remove at least a certain fixed quantity per year, was considered sufficiently certain as to the duration of the term and amount of rent. *Gilmore v. Ontario Iron Co.*, 22 Hun, 391.

<sup>2</sup> *Alderman v. Neate*, 4 M. & W. 704; *Doe v. Ries*, 8 Bing. 178; *Doe v. Benjamin*, 9 Ad. & E. 644; *Dailey v. Grimes*, 27 Md. 440.

<sup>3</sup> *Dunk v. Hunter*, 5 B. & A. 322.

<sup>4</sup> *Haughery v. Lee*, 17 La. Ann. 22. And see *People v. Gillis*, 24 Wend. 201.

<sup>5</sup> *Doe v. Ries*, 8 Bing. 181; *Chapman v. Bluck*, 4 Bing. (N. C.) 195.



be incurred;<sup>1</sup> or a stipulation, that out of the rent mentioned a proportionate abatement should be made, in respect of certain excepted premises, for until the apportionment is made, the lessor could not distrain; or with a stipulation, that the tenant shall hold *under all the usual covenants*, for it may be disputed what are usual covenants.<sup>2</sup> But, notwithstanding such a clause, an instrument of this description may still be sufficiently certain to become a lease.<sup>3</sup>

§ 43. **Actual Transfer of Possession creates Lease.** — It is manifest, therefore, from this consideration of the cases, that if an instrument, professing to be an agreement for a lease, is in itself an actual transfer of possession, whether immediate or *in futuro*, it is a lease, although it contains a stipulation for executing a subsequent lease. But if the words do not import immediate possession, or if some act is to be done prior to the entry of the tenant, an inference arises that the instrument was not intended for a lease, but only as an executory contract. Still, however, if the intention of the parties to create a lease is sufficiently explicit, it will take effect as such whether the words run in the form of a license, a covenant, or an agreement.<sup>4</sup>

§ 44. **Agreement must be Explicit. — Collateral Matter.** — It is desirable that an agreement for a lease should contain a minute of all the covenants and conditions that are to be entered into by either party, in order to avoid disputes as to what covenants a landlord is entitled to claim. Thus, if it is intended that the tenant shall pay taxes or assessments, rebuild the premises in case of fire, or keep them insured, or that he shall not underlet or assign his lease without the landlord's consent, it should be stipulated in the agreement, that proper clauses for such objects shall be contained in the lease; because these things cannot be insisted upon afterwards, unless they have been expressly bargained for. No verbal

<sup>1</sup> *Fenny v. Child*, 2 M. & S. 255.

<sup>2</sup> *Morgan v. Bissell*, 3 Taunt. 65; *Tempest v. Rawling*, 13 East, 18; *Doe v. Powell*, 8 Scott, N. R. 687, 700.

<sup>3</sup> *Doe v. Benjamin*, 9 Ad. & E. 644; *Alderman v. Neate*, 4 M. & W. 704.

<sup>4</sup> *Wilkinson v. Hall*, 3 Bing. (N. C.) 508; *Curling v. Mills*, 6 M. & G. 173.



explanations or stipulations will be permitted to vary an agreement in writing; for all negotiations between parties, prior to or contemporaneous with the execution of an instrument, are merged in it, and cannot be reconsidered.<sup>1</sup> But distinct and separable provisions, whether contemporaneous with or prior to the execution of a deed or written lease, will not be merged therein if clearly collateral.<sup>2</sup> If an agreement is silent as to what covenants are to be contained in the lease, and expresses only that it is to contain the *usual covenants*, it means only such as may be exacted, independent of positive stipulation; being such as are incident to the nature of the contract, and are therefore to be presumed to have been within the contemplation of both parties, in order to secure the full effect of the agreement. These words, however, are quite immaterial; for, in every agreement of this character, it is implied that there shall be usual and proper covenants.<sup>3</sup>

<sup>1</sup> *Pattison v. Hull*, 9 Cow. 747; *Broadwell v. Getman*, 2 Den. 87; *Renard v. Sampson*, 12 N. Y. 561; *Sourwine v. Truscott*, 17 Hun, 432; *Cleves v. Willoughby*, 7 Hill, 83. In this case evidence was disallowed tending to show that the landlord at the time of executing a written lease had promised to repair. The case was followed in *Kabus v. Frost*, 50 N. Y. S. C. 72. So where the lessor's agreement was to supply certain deficiencies in the furniture of the leased premises, a court refused to reform or cancel the lease, on the ground that agreement had merged. *Wilson v. Deen*, 74 N. Y. 531. See *Van Eps v. Mayor*, 12 Johns. 436; *Ketchum v. Evertson*, 13 *id.* 359; *Fuller v. Hubbard*, 6 Cow. 13; *H. & N. Y. St. Co. v. Mayor*, 6 N. Y. W. R. 134.

<sup>2</sup> *Witbeck v. Waine*, 16 N. Y. 532. Thus an agreement to kill down the game, made at the time of, but not incorporated in, a farming lease, although this reserved a right to keep up and hunt game. *Erskine v. Adeane*, L. R. 8 Ch. 756; *Morgan v. Griffith*, L. R. 6 Ex. 71. So where there was a distinct and collateral oral agreement preceding the lease that certain fixtures should remain for the tenant's benefit. *Lewis v. Seabury*, 74 N. Y. 409. So an agreement by landlord to put in a water-closet. *Munn v. Nunn*, 43 L. J. (N. S.) C. P. 241. So to repair. *Caulk v. Everly*, 6 Whart. 303; but this was in equity.

<sup>3</sup> *Wilkins v. Fry*, 1 Mer. 263; *Gerrard v. Grinling*, 2 Swanst. 249. A contract for a lease, though in one case held to embrace a covenant not to underlet or assign, — *Folkingham v. Croft*, 3 Anst. 700, — has repeatedly received a different construction in *Church v. Brown*, 15 Ves. 264, 271; *Henderson v. Hayward*, 3 Bro. C. C. 632; while in other cases it has been considered a proper subject for reference and inquiry. *Jones v. Jones*, 12 Ves. 190; *Boardman v. Mostyn*, 6 *id.* 471.

§ 45. **Usual Covenants.** — What are to be deemed usual covenants will depend upon circumstances; often upon the custom or usage in that respect in the section of country where the premises are situated; sometimes upon the nature of the property itself; and it seems to be properly a matter of fact for a jury to determine, and not a question of law.<sup>1</sup> It has accordingly been held that a lessor could not, as a matter of right, demand a covenant of the lessee not to assign or underlet without license;<sup>2</sup> not to carry on a particular trade or business on the premises;<sup>3</sup> or to keep them insured, or to pay land and other permanent taxes.<sup>4</sup> Nor on the other hand is it usual for a lessor to covenant to rebuild the demised premises in case of fire, with a stipulation that the rent shall cease on his failure to do so.<sup>5</sup> But a covenant for the lessee's quiet enjoyment, without interruption by the lessor, or by persons claiming under him, is usual in all cases, and is in fact incidental to every lease.

<sup>1</sup> *Bennett v. Womack*, 3 C. & P. 96, 98. This is so where the parties have stipulated for the "usual covenants;" but it is held to be a question of law where the contract for lease is silent.

<sup>2</sup> *Church v. Brown*, 15 Ves. 258; *Henderson v. Hay*, 3 Bro. C. C. 682. "Common and usual covenants," observed Lord Thurlow in this case, "must mean covenants incidental to the lease. And though the covenant not to assign without license may be a very usual one when a brewer or a vintner lets a public house, that will not make it a common covenant." The law thus laid down was confirmed in *Hodgkins v. Crowe*, L. R. 10 Ch. 622; *Hampshire v. Wickens*, 7 L. R. Ch. Div. 555; overruling *Haines v. Burnett*, 27 Beav. 500.

<sup>3</sup> *Van v. Corpe*, 3 Myl. & K. 269; *Propert v. Parker*, *ib.* 280-282.

<sup>4</sup> *Bennett v. Womack*, 7 B. & C. 627; s. c. 3 C. & P. 96. The agreement here was that tenant was to pay a *net* rent, and this was held to imply all taxes; but it was decided that otherwise the tenant would not have been bound for the land tax or sewer rate. In *Hampshire v. Wickens*, *supra*, it is stated on the authority of Davidson, Prec. Conv., vol. 5, pp. 48, 49, that the usual tenants' covenants are: (1) to pay rent; (2) taxes, except those expressly payable by landlord; (3) keep and deliver up in repair; (4) permit landlord to enter and view repairs.

<sup>5</sup> *Doe v. Sandham*, 1 T. R. 705; *Medwin v. Sandham*, 3 Swanst. 685. Under an agreement for a lease to contain all usual and necessary covenants, and particularly a covenant to keep the mill in good tenantable repair, a lessee is not entitled to have introduced into the covenant the words *damages by fire or tempest only excepted*. *Sharp v. Milligan*, 23 Beav. 419.

§ 46. **Damages for Breach of Agreement. — Equitable Relief. —** The mere signing of an agreement does not, as we have seen, establish the relation of landlord and tenant, although it may create a right of action for damages for a breach of the contract, or for a specific performance of it. And, although an agreement between an intended lessor and lessee may amount to a present demise, yet if, upon the face of it, a further instrument appears to be necessary to carry the intention of the parties into execution, equity will decree a specific performance of the agreement in that particular.<sup>1</sup> But, to call this branch of equitable jurisprudence into operation, the terms and conditions of the intended lease must either be actually expressed, or fairly to be inferred; for, if any material portion of the terms be omitted or left in doubt, the court will regard the transaction as imperfect and resting in treaty only.<sup>2</sup> And where a tenant in possession proposed to pay an increased rent, a bill for a specific execution of the proposal was dismissed, because the period when the increased rent should commence was not agreed upon; and the same thing has been done in other cases, where no mention was made of the terms of the proposed lease.<sup>3</sup> But where an agreement,

<sup>1</sup> *Fenner v. Hepburn*, 2 Y. & C. 159. Parol terms of agreement for a lease, drafted by mutual consent by lessee, were received by lessor without objection, and lessee was let into possession. Held, that there had been such part performance as to prevent the lessor from setting up the Statute of Frauds. *Cain v. Coombs*, 1 De G. & J. 34; and see *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266. But the fact that a tenant was in possession when a parol agreement for future letting was made, and made certain improvements in consideration of the expected lease, is held not to create a sufficient equity to take the case out of the operation of the statute. *Whiting v. Pittsburg Opera House Co.*, 88 Pa. St. 100.

<sup>2</sup> *Gordon v. Trevelyan*, 1 Price, 64; *Verlander v. Codd*, 1 Turn. & R. 352; 1 Younge & C. 82, 441. Thus an agreement to take a lease of a house if it shall be put in thorough repair, and the drawing-rooms handsomely decorated according to the present style, was held to be too uncertain for the court to enforce. *Taylor v. Partington*, 7 De G., M. & G. 328. A similar result followed the absence of a stipulation in the agreement respecting the duration of the proposed lease, *Myers v. Forbes*, 24 Md. 598; or of a definite description of the area leased. *Lancaster v. De Trafford*, 31 L. J. Ch. 554; *Davis v. Shepherd*, L. R. 1 Ch. 410.

<sup>3</sup> *Lord Ormond v. Anderson*, 2 Ball. & B. 363; *Clinan v. Cooke*, 1 Sch. & L. 22; *O'Herlihy v. Hedges*, *ib.* 128.

uncertain in itself, refers to another written instrument for greater certainty, or to a particular plan, as forming part of the contract, parol evidence is admissible to identify the writing or the plan; though if the evidence be not clear and satisfactory, specific performance of such an agreement will generally be refused.<sup>1</sup>

§ 47. **Remedy at Law. — Specific Performance.** — Upon the breach of an agreement to give a lease, the plaintiff may recover, in an action at law, the damages and expenses incurred by him in preparing to remove to and occupy the premises, together with the difference between the real value of the lease and the contract price.<sup>2</sup> But, in seeking specific performance, he must not only make it appear that he is endeavoring to enforce a fair and reasonable contract, but must also show that his own conduct, in reference to it, has been fair, and free from suspicion; for, if there be a reasonable doubt thrown upon the transaction in either respect, he will be left to his legal remedy for the non-performance of the contract.<sup>3</sup> And therefore where a party to an agreement acted to the preju-

<sup>1</sup> *Hodges v. Horsfall*, 1 Russ. & M. 116; *Clinan v. Cooke*, 1 Sch. & L. 83. Where a landlord agreed to grant leases of successive plots of ground, as houses upon each of them should be built to a certain stage, when the assignee of the builders' interest had completed houses upon some of these plots, he was held to be entitled to leases of those plots, although he disclaimed all interest in the remaining plots. *Wilkinson v. Clements*, L. R. 8 Ch. 96.

<sup>2</sup> *Ward v. Smith*, 11 Price, 19; *Driggs v. Dwight*, 17 Wend. 71; but not the profits which he might have made if he had obtained possession. *Giles v. O'Toole*, 4 Barb. 261. And see *post*, § 317.

<sup>3</sup> *Flood v. Finlay*, 2 Ball & B. 16; *O'Rourke v. Percival*, *ib.* 58; *Harris v. Kemble*, 1 Sim. 111. The remedy by specific performance is discretionary. The question is not, what must the court do, but what in view of all the circumstances of the case should it do, to further justice. When a contract has been fairly procured, and its enforcement will work no injustice or hardship, it is enforced almost as a matter of course; but if it has been procured by any sort of fraud or falsehood, or its enforcement will be attended with great hardship or manifest injustice, the court will refuse its aid. *Plummer v. Keppler*, 26 N. J. Eq. 481; *Miss. R. R. Co. v. Cromwell*, 91 U. S. 643; *Fish v. Leser*, 69 Ill. 394. And the plaintiff must perform on his own part the conditions prescribed as to be performed by him in the agreement. *Williams v. Briscoe*, 22 Ch. D. 441.

dice of the other party, as if he had abandoned his contract to take a lease, his bill for specific performance was dismissed.<sup>1</sup> Nor will an agreement to grant a lease be enforced in favor of a tenant where evidence is adduced of his having been guilty of fraud or felony; or on proof of his insolvency, or of a commission of waste; or that there was a want of good husbandry on his part, whilst holding under the agreement for a lease.<sup>2</sup>

§ 48. **Agreement to lease, when enforced in Equity.**—The court will not compel the acceptance of a lease, unless the party seeking performance is able to perform the contract on his part, by granting a secure lease for the term agreed upon; and an offer of pecuniary compensation, in case of eviction, will not alter the case, because such indemnity cannot extend to the specific object of the contract, which is the possession and occupation of the premises.<sup>3</sup> But where a man contracts to grant a lease of an estate, when he is entitled to only a portion of it, the contract may be enforced by the proposed lessee, as to that part of which the grantor is owner.<sup>4</sup> An agreement, however, by a person out of possession, to grant a present lease to a party who is apprised that he cannot obtain possession of it except by suit, will not be enforced; for this becomes a contract for a lawsuit, which is not a lawful subject of contract, and is not therefore a valid agreement for a lease.<sup>5</sup> But a person who has contracted for the lease of a

<sup>1</sup> *Garrett v. The Earl of Besborough*, 2 Dru. & Walsh, 441.

<sup>2</sup> *Willingham v. Joyce*, 3 Ves. 168; *Brooke v. Hewitt*, *id.* 253; *Buckland v. Hall*, 8 *id.* 92; *Featherstonhaugh v. Fenwick*, 17 *id.* 313; *Pearson v. Knapp*, 1 Myl. & K. 312; *Hill v. Barclay*, 18 Ves. 63. But the insolvency must be general; one instance of non-payment of rent will not suffice. *Neale v. McKenzie*, 1 Keen, 474. Equity will not compel specific performance of a lessee's agreement with a third party, to assign a lease in which he has covenanted with the lessor not to assign without license; since, as the third party seeking relief must treat the lease as existing, he must take it with the covenant against assignment as in force. *Willmott v. Barber*, 15 Ch. D. 96.

<sup>3</sup> *Fildes v. Hooker*, 2 Mer. 424.

<sup>4</sup> *O'Rourke v. Percival*, 2 Ball & B. 64.

<sup>5</sup> *Bayly v. Tyrrell*, 2 Ball & B. 358. So where tenant may be subjected to lawsuit: *Pegler v. White*, 33 Beav. 403; or to excessive expense to repair: *Tildesley v. Clarkson*, 30 *id.* 419.

mine cannot resist performance, merely on the ground of his ignorance of mining matters, and that the mine turns out to be worthless.<sup>1</sup>

§ 49. **Agreement must be in Writing unless confessed or partly performed.**—As a general rule, also, the specific performance of an agreement for a lease will be ordered only when it is in writing, and conforms to the statute in all other respects; but it may be decreed, although not in writing, if it is fully set forth in the bill and confessed by the answer;<sup>2</sup> or if it has been partly carried into execution by the performance of such acts as clearly appear to have been done with a view to the agreement being fully performed; or under such circumstances as would manifestly operate as a fraud upon the other party unless the agreement should be so performed.<sup>3</sup> And in all cases, a plaintiff is expected to exercise due diligence in enforcing his claim; for an application of this kind, being addressed to the discretion of the court, will not be entertained in favor of a person who has long slept on his rights, or acquiesced in a title and possession adverse to his claim.<sup>4</sup>

<sup>1</sup> *Haywood v. Cape*, 25 Beav. 140.

<sup>2</sup> *Att'y-General v. Sitwell*, 1 Younge & C. 583.

<sup>3</sup> *Ante*, §§ 32, 33; *Nunn v. Fabian*, L. R. 1 Ch. 35; where payment by the tenant of one quarter's rent, at the new rate, took a verbal contract for a further lease for twenty-one years out of the statute. So where the proposed lessee had entered, ostensibly as under the lease, and had paid rent, and the lessor, relying upon the lessee's good faith had made improvements on the premises, a decree was made that the lease be executed by the tenant. *Seaman v. Aschermann*, 51 Wis. 678; *Same v. Same*, 57 *id.* 547. Although the subject of a specific performance of contracts is not strictly within the scope of this work, it may not be entirely foreign to our purpose to observe incidentally that, in general, a specific performance will not be enforced where accident or mistake would render it inequitable; *Schmidt v. Livingston*, 3 Edw. 213; *Clowes v. Higginson*, 1. Ves. & B. 524; or where the transaction is tainted with fraud, surprise, or misrepresentation: *Veeder v. Fonda*, 3 Paige, 94; *Faure v. Martin*, 7 N. Y. 210; *Best v. Stow*, 2 Sandf. Ch. 298; or may appear to be unreasonable or to work injustice: *Story*, Eq. §§ 74, 769; *Mathews v. Terwilliger*, 3 Barb. 50; *Clarke v. Roch. R. R.* 18 Barb. 350. See also *Fombl. Eq.* 45–48, 281; 1 *Story*, Eq. § 712; *Seymour v. Delancey*, 6 Johns. Ch. 222; *Slocum v. Clossen*, 1 How. Ap. Cas. 705, 751.

<sup>4</sup> *Moore v. Blake*, 1 Ball & B. 62; *Hudson v. Bartram*, 3 Madd. 440;

And whether the laches consisted in not prosecuting, or in not commencing a suit, is immaterial; but the doctrine of laches does not apply to a contract in part executed, by the party's having been in the enjoyment of benefits given him by the contract.<sup>1</sup>

*Hertford v. Boore*, 5 Ves. 720; *Mix v. Baldue*, 78 Ill. 215; *Peck v. Brighton Co.*, 69 *id.* 200; *McDermid v. McGregor*, 21 Minn. 111.

<sup>1</sup> *Clarke v. Moore*, 1 Jones & Lat. 723. If a person has agreed to execute a lease, or other deed by a certain day, he is not in default until the party who is to receive it, being entitled thereto, has demanded it. In England the party entitled to a deed is bound to have it drawn, and presented for execution; but our law has not gone so far. The party who is to give the deed should have it drawn at his own expense, execute it, and hold it ready for delivery when called for. The lessee may, of course, if he thinks proper, prepare the deed, and tender it for execution. *Carpenter v. Brown*, 6 Barb. 149, overruling the cases of *Connelly v. Pierce*, 7 Wend. 129; *Fuller v. Hubbard*, 6 Cow. 1. But a deed is not complete, nor is the grantee bound to accept it, unless it is in a condition to entitle it to be recorded, by having a proper clerk's certificate attached to it, when it is to be recorded in a county different from that where it was acknowledged. *Smith v. Smeltzer*, 1 Hilt. 287.

## CHAPTER II.

## OF THE DIFFERENT SPECIES OF TENANCY.

## SECTION I.

## TENANCY IN FEE OR FOR LIFE.

§ 50. **Fee may be created in form of Lease.**— Lands and tenements may be granted in fee by a deed in which rent is reserved or covenanted to be paid.<sup>1</sup> Sometimes other covenants are inserted with conditions to enforce the grantee's performance. But such instruments are more properly conveyances than leases, creating no tenure, and having little else in common with the latter class of instruments than the reservation or charge of a rent, with the covenant or condition that secures, and the remedies by action, entry, or distress that enforce, the grantee's payment thereof. The reader is therefore referred for further consideration of such conveyances to the chapters in which these topics are treated of in detail.<sup>2</sup>

§ 51. **Tenancies for Years and for Life distinguished.**— We have already noticed a material difference between leases for years and leases for a life or lives, in that the latter confer a freehold, while the former, without respect to their periods of duration, amount to no more than a mere chattel interest.<sup>3</sup>

<sup>1</sup> *Saunders v. Hayes*, 44 N. Y. 79; and see *Watterson v. Reynolds*, 95 Pa. St. 474.

<sup>2</sup> *Post*, §§ 261, 284, 285, 370, 440, &c.

<sup>3</sup> *Flannery v. Rohmayer*, 49 Conn. 27; *Faler v. McRae*, 56 Miss. 227.



More important distinctions are, that an estate for life cannot be made to commence *in futuro*, nor can it be created merely by parol. Other incidents of this estate, so far as they are applicable to our subject, and the various particulars by which the law distinguishes freehold interests from chattels real, will be noted from time to time as we proceed.

§ 52. **Life Estate, how created.** — An estate for life may be created either by express limitation or by a grant in general terms. If made to a man for the term of his own life, or for that of another person, he is called a tenant for life. But the estate may also be created by a general grant, without defining any specific interest; as where a grant is made to a man, or to a man *and his assigns* without any limitation in point of time, it will be considered as an estate for life, and for the life of the grantee only.<sup>1</sup> A grant may also be made to one or more persons, to endure for their joint lives, or the life of the survivor, as well as for the life of a stranger. And when it is intended that a lease to two or more persons shall determine on the life of either, the grant should be stated to be for and during their joint lives. If the interest is to continue to the survivor, it is sufficient to grant it generally for their lives, without inserting words of survivorship; and on the death of either, the entire estate will survive to the other. But if the lease be granted for a certain term of years, *if the lessees shall so long live*, the interest will determine with the death of one.

§ 53. **Without limitation in time, Estate is for life.** — Where a grant is made, subject to be defeated by a particular event, and there is no limitation in point of time, it will be *ab initio* a grant of an estate for life, as much as if no such event

<sup>1</sup> Co. Lit. 42, a; *Jackson v. Embler*, 14 Johns. 198; *Clearwater v. Rose*, 1 Blackf. 137; *Gray v. Parker*, 4 W. & S. 17. This common-law provision is modified by 1 N. Y. R. S. 748, § 1. Every grant of land, or of any interest therein, shall pass all the estate or interest of the grantor, without the use of the word "heirs" or other words of inheritance; unless the intent to pass an inferior estate or interest shall appear by express terms, or by necessary implication.

had been in contemplation. As if a grant be made to a man so long as he shall inhabit a certain place, or to a woman during her widowhood; as there is no certainty that the estate will be put an end to by the change of habitation, or by the marriage of the respective lessees, the estate is as perfect an estate for life, until such an event takes place, as if it had been so granted in express terms.<sup>1</sup> And in a case where the plaintiff agreed to pay the defendant one hundred pounds per annum during the defendant's life, for which the plaintiff was to have the defendant's land and negroes, the court held it to be substantially a lease for the life of the defendant, and not an absolute sale, as was contended.<sup>2</sup> Estates for life are frequently created by will, for the purpose of providing a maintenance for some of the testator's family. And whenever a devise of land is made without words of perpetuity, and there is nothing in the will from which a fee can be raised by implication, the devisee takes only a life-estate.<sup>3</sup>

## SECTION II.

### LEASES FOR YEARS, AND FROM YEAR TO YEAR.

§ 54. **How created.** — Leases may be granted, in express terms, for one or more years, or for any part of a year; and, in either case, the lessee will be treated as a tenant for years, and is usually so called. The ordinary mode of leasing is for

<sup>1</sup> Co. Lit. 42, a; Com. Landl. & T. 4. So where the term was to last so long as the lessor should use the premises for the purpose of carrying on a certain manufacture. *Warner v. Tanner*, 38 Ohio St. 118. But see *Gilmore v. Hamilton*, 83 Ind. 196. An estate for life, even if determinable when the rents shall have paid a debt to the lessee, is a freehold, which cannot be created without deed. *People v. Gillis*, 24 Wend. 201. A lease to a man, his executors, administrators, and assigns forever, is a lease for life. *Williams v. Woodard*, 2 *id.* 487; *Bloomer v. Waldron*, 3 Hill, 361.

<sup>2</sup> *Mickie v. Ex'rs of Wood*, 5 Rand. 574; *Newton v. Wilson*, 3 Hen. & M. 470; *Maverick v. Lewis*, 3 McCord, 211.

<sup>3</sup> *Jackson v. Embler*, *supra*; *Witherspoon v. Dunlap*, 1 McCord, 546; *Gray v. Parker*, *supra*.

a specified term of years ; but if no particular period of time is limited for its duration, a tenancy from year to year will arise. This species of letting, where no certain time is mentioned, according to the strictness of the ancient law, continued during the pleasure of the parties, and might have been put an end to at any time, by either party ; the lessee, in such case, being in fact a mere tenant at will. But it was determined at an early period, upon principles of justice and sound policy, that estates at will were at the will of both parties, and neither of them was permitted to exercise his pleasure contrary to equity and good faith. The lessor could not terminate the estate after the tenant had sown, and before he had reaped his crop, so as to prevent the necessary egress and regress to take away the emblements ;<sup>1</sup> nor could the tenant, before the usual period for the payment of rent had arrived, determine the estate so as to deprive the landlord of the rent which would accrue at that time.<sup>2</sup>

§ 55. *Arise from general Occupation.* — Since the time of the Year Books, however, the courts have treated a general occupation by permission, no time being fixed for its continuance, as a tenancy from year to year, whenever the reservation of rent or other circumstances indicated an agreement for an annual holding.<sup>3</sup> A tenancy of this description is not

<sup>1</sup> *Jackson v. Bradt*, 2 Caines Cas. 169 ; *Ellis v. Paige*, 2 Pick. 71, n.

<sup>2</sup> *Sullivan v. Enders*, 3 Dana, 66 ; *Kightly v. Bulkley*, 1 Sid. 338. A tenant at will cannot put an end to his tenancy, even by an assignment without giving notice to his landlord. *Pinhorn v. Souster*, 8 Exch. 763.

<sup>3</sup> *Jackson v. Wilsey*, 9 Johns. 267 ; *Craske v. Christ. Un. Pub. Co.* 17 Hun, 319 ; *Lesley v. Randolph*, 4 Rawle, 123 ; *Thomas v. Wright*, 9 S. & R. 87 ; *Hey v. McGrath*, 81\* Pa. St. 310 ; *Roe v. Lees*, 2 W. Bl. 1171. *Richardson v. Langridge*, 4 Taunt. 128, 131. By R. S. Ind. 1876, p. 338, § 2, R. S. 1881, §§ 5208, 5209, all general tenancies in which the premises are occupied by the express or constructive consent of the landlord are to be deemed tenancies from year to year. See *Tolle v. Orth*, 75 Ind. 298. In *Cattley v. Arnold*, 1 Johns. & H. 651, 656, it is said, "As early as the reign of Hen. VIII., on any holding on which annual rent is reserved, the tenant is entitled to one half year's notice to quit." It is often stated that tenancies from year to year have been implied from the earliest times, whenever there was a general holding, without regard to annual rent or other circumstances pointing to a yearly tenancy. 4 Kent,

determinable at the end of any current year, unless a proper notice to quit shall have been previously served by the party intending to dissolve the tenancy upon the other;<sup>1</sup> in default

Com. 113; *Parker v. Constable*, 3 Wils. 25; *Jackson v. Bryan*, 1 Johns. 322; *Wilmot, J.*, in *Timmins v. Rawlinson*, 3 Burr. 1609; *Putnam, J.*, in *Ellis v. Paige*, 2 Pick. 71, n.; *Doe v. Watts*, 7 T. R. 85; and see *Leavitt v. Leavitt*, 47 N. H. 329. But such a proposition is not borne out by authorities ancient or modern. In the earliest times all parol tenancies were at the will of the lessor, even though expressly for years, or from year to year: *Smith L. & T.* 8; 14 Hen. VIII. 13; and when at will from year to year were only after a struggle held at the will of both parties: *Litt.* § 68; *Co. Litt.* 55, a; *Keilw.* 65, pl. 6; *ib.* 162, pl. 4; 13 Hen. VIII. 16 pl. 1; 14 *id.* 13. A regard for the tenant's right to emblements also allowed him to enter and take the crop, or even to remain until it was fit for removal. 35 Hen. VI. 24 pl. 30; 13 Hen. VIII. 16 pl. 1; *Kighly v. Bulkley*, 1 Sid. 339. But this was only in farming tenancies: 14 Hen. VIII. c. 13; *Smith L. & T.* 20; and only formed one element in establishing a holding from year to year. *Ib.* And see *Leavitt v. Leavitt*, 47 N. H. 340. And it will be found that in all these cases there was either an express parol demise from year to year, or rent paid in reference to such a period. Since the Statute of Frauds, the authorities have been equally clear in requiring an annual holding or rent, &c. *Roe v. Lees*, *supra*. In *Richardson v. Langridge*, the court say: "Surely, the distinction has been a thousand times taken; a mere general letting is a letting at will; if the lessor accepts yearly rent, &c., that is evidence of a taking for a year." This is quoted and affirmed in *Braythwayte v. Hitchcock*, 10 M. & W. 497; *Doe v. Wood*, 14 *id.* 682, 686; and is the settled law in England. *Cattley v. Arnold*, 1 Johns. & H. 651, 656; *Smith & Soden, L. & T.* 48-52, and cases there cited. And see *post*, § 56, notes 2 and 3. Of the cases apparently *contra*; in *Timmins v. Rawlinson*, and *Doe v. Watts*, there was an express annual demise and rent paid or reserved. *Jackson v. Bryan* is inconsistent with *Jackson v. Bradt*, 2 Caines, 169; and *Bradley v. Covel*, 4 Cow. 350. In *Jackson v. Miller*, 7 *id.* 747, the case was between vendor and vendee. In *Den v. M'Kay*, 1 Penningt. 420, the occupant for fifteen years was held only entitled to "some notice." In *Leavitt v. Leavitt*, the oral demise was not general, but for life; and in every case cited in the elaborate judgment of *Putnam, J.*, 2 Pick. 71, n., the demise was referable to a yearly holding, or the decision turned on the right to emblements. This is ably shown in *Rich v. Bolton*, 46 Vt. 84, which sustains the text; and, to the same effect are *Williams v. Deriar*, 31 Mo. 13; *Jones v. Willis*, 8 Jones, (N. C.) 430; *Johnson v. Johnson*, 13 R. I. 467. In Massachusetts and Maine, tenancies from year to year are unknown. *Ellis v. Paige*, 1 Pick. 43; *Withers v. Larrabee*, 48 Me. 570.

<sup>1</sup> The right to determine such a tenancy is, however, an inseparable incident thereof; and will even control an express clause that such a ten-

of which the tenancy will run on from year to year, until some event happens which, in contemplation of law, destroys it.<sup>1</sup> And this rule applies to the tenant as well as to the landlord. Even if the tenant gives up the premises to an under-tenant, the landlord may still look to him for the rent of that year, unless he has accepted the incoming tenant, and received rent from him; for, in that case, he will be deemed to have made his election to accept him as a tenant.<sup>2</sup>

§ 56. **Arise from void parol Demises for Years.** — This implied tenancy, from year to year, will arise in the cases where occupation is had under a parol demise for years, void because exceeding the periods allowed by the Statute of Frauds.<sup>3</sup> So,

ancy is to continue as long as rent is paid without disturbance from the lessor. *Doe v. Browne*, 8 East, 165; *Holmes v. Day*, 8 Ir. R. C. L. 235; *West Tr. Co. v. Lansing*, 49 N. Y. 499. And a surety of lessee may avail himself of this right. *Pleasanton's Appeal*, 75 Pa. St. 344.

<sup>1</sup> *Right v. Darby*, 1 T. R. 159; *Clayton v. Blakey*, 8 *id.* 3; *Witt v. New York*, 5 Rob. (N. Y.) 248. A tenancy from year to year is not to be considered as a continuous tenancy, but as recommencing every year. *Gandy v. Jubber*, 5 B. & S. 78. In *Oxley v. James*, 13 M. & W. 214, Parke, B., says, "The nature of an estate from year to year" is "a lease for a year certain with a growing interest during every year thereafter, springing out of the original contract and parcel of it;" cited and approved in *Cattley v. Arnold*, *supra*; where it is said, p. 656, "consequently the moment any new year begins, the tenant has a right to hold to the end of that year." But whether the holding over the term or payment of rent is with intent to continue as tenant from year to year, is for the jury. *Jones v. Shears*, 4 Ad. & E. 832; *Doe v. Crago*, 6 C. B. 90; *Skaggs v. Elkus*, 45 Cal. 154; *Gray v. Bompas*, 11 C. B. n. s. 520. A tenancy from year to year cannot be determined, so as to bar the interest of the tenant's creditors, unless there is either a legal notice to quit, or a surrender in writing. *Doe v. Ridout*, 5 Taunt. 519.

<sup>2</sup> *Levi v. Lewis*, 6 C. B. n. s. 766; *Ibbs v. Richardson*, 9 Ad. & E. 849; *Den v. McIntosh*, 4 Ired. 291; *Tomkins v. Lawrance*, 8 C. & P. 729. But merely receiving rent from him is not conclusive. *Simkin v. Ashurst*, 1 C. M. & R. 261.

<sup>3</sup> *Doe v. Bell*, 5 T. R. 472; *Doe v. Weller*, 7 *id.* 478; *Clayton v. Blakey*, 8 *id.* 3; *Knight v. Bennett*, 3 Bing. 361; *Berry v. Lindley*, 3 M. & G. 498; *Barlow v. Wainwright*, 22 Vt. 88; *Schuyler v. Leggett*, 2 Cow. 660; *People v. Rickert*, 8 *id.* 226; *Lounsbery v. Snyder*, 31 N. Y. 514; *Greton v. Smith*, 33 *id.* 245; *Thomas v. Nelson*, 5 *id.* 118; *Thomas v. Nelson*, 69 *id.* 118; *Laughran v. Smith*, 75 N. Y. 205 (but see *Prial v.*

where a tenant for years holds over and pays rent, he is impliedly bound by the terms of his former tenancy.<sup>1</sup> But where three persons entered upon the premises under a lease for seven years, which was not signed by the lessor, and was therefore under the Statute of Frauds to be considered a mere tenancy at will, and payments of rent were made, which were not shown to be with the assent of one of the three who had not resided a year on the premises, it was held that, as against her there was no evidence of a tenancy from year to year; for, to establish this, it was said the agreement of all the parties must be shown.<sup>2</sup>

§ 57. **But not on Demises for less than a Year.** — Where, however, a tenant for a term less than a year, whether for a quarter, month, or week, holds over;<sup>3</sup> or where the letting is by the quarter, month, or week indefinitely, and not as for an aliquot part of the year, the tenancy is from quarter to quarter, &c., until a notice to quit, proportionate to such holding,

Entwistle, 10 Daly, 398); *Freidhoff v. Smith*, 13 Neb. 5; *Koplitz v. Gustavus*, 48 Wisc. 48; *Williams v. Ackerman*, 8 Oregon, 405; *Railsback v. Walker*; 81 Ind. 409; *Lockwood v. Lockwood*, 22 Conn. 433; *Thurber v. Dwyer*, 10 R. I. 355; *Shepherd v. Cummings*, 1 Coldw. 354; and the lease though void may be referred to, to ascertain and regulate the rights of the parties, *ib.*; and see *Porter v. Bleiler*, 17 Barb. 149; *Martin v. Smith*, 43 L. J. Exch. 42. So if the rent be reduced and possession continued, and rent paid and accepted, the provisions of the old lease will govern the relations of the tenancy so far as applicable. *Singer Mfg. Co. v. Sayre*, 75 Ala. 270.

<sup>1</sup> *Thiebaud v. Vevay*, 42 Ind. 212; (see *Montgomery v. Commissioners*, 76 *id.* 362); *Tolle v. Orth*, 75 *id.* 298; *Coomler v. Heffner*, 86 *id.* 108; *Bright v. McOuat*, 40 *id.* 521; *Schuyler v. Leggett*, *supra*; *Hall v. Myers*, 43 Md. 446; *Hutton v. Warren*, 2 Gale, 71; *Stoppelkamp v. Maugeot*, 42 Cal. 316; *Cobb v. Kidd*, 19 Blatch. 560; *Hibbard v. Newman*, 2 Baxt. 285; and see cases *post*, § 525. If the tenant has been notified that if he remains it will be at a higher rent, he is presumed to accept these terms by holding over. *Mack v. Burt*, 5 Hun, 28; *Despard v. Walbridge*, 15 N. Y. 374; *Reithman v. Brandenburg*, 7 Col. 480. But *aliter* if the landlord further demands possession. *Stoppelkamp v. Maugeot*, *supra*.

<sup>2</sup> *Doidge v. Bowers*, 2 M. & W. 365; *Denn v. Fearnside*, 1 Wils. 176; *Goodtitle v. Herbert*, 4 T. R. 680.

<sup>3</sup> *Stoppelkamp v. Maugeot*, *supra*; *Bright v. McOuat*, 40 Ind. 521.

is given.<sup>1</sup> But no such continuing tenancy will be held to exist where the agreement stipulates for the payment of rent, and for occupation during a simple quarter or month;<sup>2</sup> or though the rent agreed to be paid is annual, if the tenant is expressly stated to hold at the lessor's will and pleasure.<sup>3</sup>

§ 58. **How determined.**—Although a tenancy from year to year originally differed from a tenancy at will only in regard to the right of either landlord or tenant to a formal notice to quit,<sup>4</sup> yet the absolute right to such a notice has, in fact, made the former no longer a tenancy at will, but a term subject to be determined by a regular notice to quit expiring with the tenant's year.<sup>5</sup> This species of tenancy is not determined by the death of either the lessor or lessee;<sup>6</sup> it is

<sup>1</sup> *Doe v. Hazell*, 1 Esp. 94; *Doe v. Raffan*, 6 *id.* 4; *Anderson v. Prindle*, 23 Wend. 616; *People v. Botsford*, 47 N. Y. 666; *Jones v. Willis*, 8 Jones (N. C.), Law, 430; *Stoppelkamp v. Maugeot*, *supra*; *Skaggs v. Elkus*, 45 Cal. 154; *Hollis v. Burns*, 100 Pa. St. 206; *Rothschild v. Williamson*, 83 Ind. 387; *Coomler v. Heffner*, 86 *id.* 108. Where the tenant holding over proposed to pay a certain monthly rent until he could find another place, and the landlord made no reply, but accepted the rent for the current month, and announced the premises for rent, it was held that this created a monthly tenancy until the tenant should find another place, and not longer. *Hoffman v. McCollum*, 98 *id.* 326. And see Com. Dig. Est. H. 9; *Hammon v. Douglas*, 50 Mo. 434, 437. *Coffin v. Lunt*, 2 Pick. 711. But see *Huffell v. Armistead*, 7 C. & P. 56.

<sup>2</sup> *Wilkinson v. Hall*, 3 Bing. (N. C.) 508; *Blumenberg v. Myres*, 32 Cal. 93; *Stoppelkamp v. Maugeot*, *supra*.

<sup>3</sup> *Doe v. Cox*, 11 Q. B. 122.

<sup>4</sup> *Phillips v. Covert*, 7 Johns. 1; per Kent, C. J. This was a dictum, correct as to the origin of such tenancies, but not law when uttered. See notes 5–10, *infra*. It was, however, repeated and acted on in *Bradley v. Covel*, 4 Cow. 349; and *Nichols v. Williams*, 8 *id.* 13, as if sound; and in this last case the tenant's right to notice was limited to the action of ejectment, and he was held liable in summary process without any notice whatever.

<sup>5</sup> *Cattley v. Arnold*, *supra*; *Oxley v. James*, 13 M. & W. 209. And the same is true of continuing tenancies, though for a less period than a year.

<sup>6</sup> *Maddon v. White*, 2 T. R. 159; *Doe v. Porter*, 3 *id.* 13; *Doe v. Wood*, 14 M. & W. 682; *Botheroyd v. Woolley*, 5 Tyrw. 522; *Cattley v. Arnold*, *supra*.



assignable and demisable;<sup>1</sup> though only during its continuance;<sup>2</sup> it may also be mortgaged;<sup>3</sup> and may be pleaded as a term.<sup>4</sup>

### SECTION III.

#### TENANCY AT WILL.

§ 59. **How created.** — Tenancies at will may be created by express words, or they may arise by implication of law. Formerly, all leases for uncertain periods were held to be tenancies at will merely; and if a termor granted the land generally, the grantee was but a tenant at will,<sup>5</sup> for, as it did not appear that the grantor meant to pass his whole interest, an estate at will was held to satisfy the grant.<sup>6</sup> But, in modern times, courts have evinced a disposition to construe tenancies of this description into tenancies from year to year,<sup>7</sup>

<sup>1</sup> *Pleasant v. Benson*, 14 East, 234; *Mackay v. Mackeith*, 4 Doug. 213; *Cody v. Quarterman*, 12 Ga. 386; *Curtis v. Wheeler*, 1 Mood. & M. 493; *Austin v. Thomson*, 45 N. H. 113. In *Hemphill v. Giles*, 66 N. C. 512, however, it seems held that an assignment of the landlord's title divests the tenant of his right to notice.

<sup>2</sup> *Pike v. Eyre*, 9 B. & C. 909.

<sup>3</sup> *Burrowes v. Gradin*, 1 Dowl. & L. 213.

<sup>4</sup> *Howe v. Kensett*, 3 Ad. & E. 659; *Tomkins v. Lawrance*, 8 C. & P. 729; *Cattley v. Arnold*, *supra*; *Parrott v. Barnes*, Deady, 405. Hence a demise by a tenant from year to year, for a term of years, is no assignment; for by possibility his tenancy may outlast the term, and he has therefore a reversionary interest in which he may distrain. *Oxley v. James*, *supra*.

<sup>5</sup> See *Johnson v. Johnson*, 13 R. I. 467, where it is held, following *Kent*, 4 Com. 144, that "if a tenant be placed on the land without any terms prescribed and as a mere occupier, he is strictly a tenant at will." To the same effect, *Le Tourneau v. Smith*, 53 Mich. 473.

<sup>6</sup> *Griffin's Case*, 2 Leon. 78.

<sup>7</sup> *Doe v. Wood*, 14 M. & W. 682. Where there has been an agreement for a lease, and an occupation without payment of rent, the occupant is a mere tenant at will. *Braythwayte v. Hitchcock*, 10 M. & W. 494. If he afterwards pays rent under that agreement, he becomes tenant from year to year. But in order to establish a tenancy from year to year, the payment of rent must be in reference to a yearly holding. *Ib.* The receipt of rent may be explained so as to rebut the implication of a yearly



provided any circumstances appeared referable to an annual holding.<sup>1</sup>

§ 60. **Strict and General** — Notwithstanding this disposition, therefore, tenancies at will do still subsist. But a distinction must be observed between a strict and a general tenancy at will. The former species has only the rights of an ancient tenancy at will or at sufferance, being in fact little more than a license to be upon the land, determinable by entry or demand, and often does not create the relation of landlord and tenant, nor render the occupant liable for rent in an action for use and occupation, nor entitle him to notice to quit;<sup>2</sup> while the latter confers the rights which tenancies at will subsequently acquired, including a reasonable notice to quit; and subjects the occupant to all the liabilities of tenants proper, as well as for use and occupation. Thus a person who holds rent-free by permission of the owner, or who enters upon the premises under an agreement to purchase, or for a lease, but has not paid rent, or refuses to accept a lease, is strictly a tenant at will.<sup>3</sup> A parol gift of lands also

tenancy which arises from payment thereof. *Doe v. Crago*, 6 C. B. 90. It is held that a tenancy at will is changed into a tenancy for fixed term by an agreement that, at a future day named, the tenant shall vacate and surrender the premises. *Engels v. Mitchell*, 30 Minn. 122.

<sup>1</sup> *Ante*, §§ 55, 56, and notes. In Indiana, by statute, 2 Gavin & H. 359, no tenancy at will can arise except by express agreement. But holding over, under a privilege to that effect in the lease, was held such an agreement. *Bright v. McOnat*, 40 Ind. 521; *Knight v. Ind. Coal Co.*, 47 *id.* 105. A tenancy at will does not arise before entry by the lessee. *Pollock v. Kittrell*, 2 Tayl. 153; *Hardy v. Winter*, 38 Mo. 106.

<sup>2</sup> The possession of a tenant at will is the possession of the lessor. *Den v. Fearnside*, 1 Wils. 175.

<sup>3</sup> *Kirtland v. Pounsett*, 2 Taunt. 145; *Doe v. Stanion*, 1 M. & W. 700; *Doe v. Miller*, 5 C. & P. 595; *Prop'rs v. McFarland*, 12 Mass. 325; *Gould v. Thompson*, 4 Met. 224; per Clarke, J., *Sarsfield v. Healey*, 50 Barb. 246; *Herrell v. Sizeland*, 81 Ill. 457; *Rich v. Bolton*, 46 Vt. 84; *ante*, § 25, n. By statute in New Hampshire, Vermont, and Ohio, as well as in Massachusetts and Maine, all parol leases are at will; in the three first-named States these may become tenancies from year to year. *Ante*, § 55, n; *Thomas v. Sanford Steamship Co.*, 71 Me. 548. Though a person in possession under a verbal contract of purchase is a tenant at will, he is not liable for rent so long as he performs the terms of his contract, or

creates this species of tenancy; and if the donee makes a lease for years, it is void and cannot be rendered valid by any subsequent assent of the donor.<sup>1</sup> So if the agreement be to let the premises so long as both parties choose, reserving a compensation to accrue *de die in diem* and not referable to a year, or to any aliquot parts of a year, it creates a strict tenancy at will.<sup>2</sup> And where a party enters into the possession of premises under an agreement to accept a lease for twenty months, and subsequently refuses to accept the lease, he becomes, by such refusal, a strict tenant *at will*, for he may be ejected immediately.<sup>3</sup> But if the landlord accepts rent from him monthly, or according to the terms of the original agreement, a general tenancy at will is created, commencing from the time of entry.<sup>4</sup> If a tenant whose lease has expired is permitted to continue in possession, pending a treaty for a further lease, he is not a tenant from year to year, but so strictly at will that he may be turned out of

these are waived by the vendor. And all improvements made by such person while the contract is in force are made by virtue of the contract and not as tenant, and so these become a part of the freehold. *Lapham v. Norton*, 71 *id.* 83.

<sup>1</sup> *Jackson v. Rogers*, 1 Johns. Cas. 33; *Jackson v. Bradt*, 2 Caines, Cas. 169; *Patterson v. Stoddard*, 47 Me. 355; *Jones v. Jones*, 2 Rich. 542.

<sup>2</sup> *Richardson v. Langridge*, 4 Taunt. 128; *Say v. Stoddard*, 27 Ohio St. 478; *Leavitt v. Leavitt*, 47 N. H. 229, 340; *Grovenor v. Henry*, 27 Iowa, 269. A written lease is at will if no termination is fixed, though an annual rate of rent is agreed upon, and the lessor has the right to re-enter after two years: *Murray v. Cherrington*, 99 Mass. 229; *Cudley v. Randall*, 4 Mod. 9. *Aliter*, when the lease is for a definite number of years, with provision that it shall continue for another year thereafter unless terminated by notice. *Dix v. Atkins*, 130 Mass. 171. A written agreement for an uncertain time is at will: *Gardner v. Hazelton*, 121 Mass. 494; or not fixing any time or rent: *Larned v. Hudson*, 60 N. Y. 102. See also *Morton v. Woods*, 9 B. & S. 632, 644. A tenant who holds over under promise of a lease is at will, not at sufferance. *Emmons v. Scudder*, 115 Mass. 367.

<sup>3</sup> *Dunne v. Trustees*, 39 Ill. 578; *Denn v. Fearnside*, 1 Wils. 176; *Doe v. Watts*, 7 T. R. 83; *Bennett v. Ireland*, Ellis, B. & E. 326; *Chamberlain v. Dunshee*, 45 Vt. 50; *Rich v. Bolton*, *supra*.

<sup>4</sup> *Anderson v. Prindle*, 23 Wend. 616; *Milling v. Becker*, 96 Pa. St. 182.

possession without notice.<sup>1</sup> But while a man who enters under a void lease is strictly at will,<sup>2</sup> if he pays rent he becomes a general tenant at will or from year to year according to circumstances; although a notice to quit will always terminate this tenancy, or turn it into a tenancy from year to year.<sup>3</sup>

§ 61. **Strict and General distinguished.**—The agreement, express or implied, for a periodical rent or time is the usual criterion to distinguish between general tenancies at will, and those strictly so.<sup>4</sup> The decisions in regard to the former class of tenancies have chiefly turned on the question of notice; and without further adjudication it is difficult to say how far the characteristics of a term, such as assignability, &c., which have been held to belong to tenancies from year to year,<sup>5</sup> will be construed to apply to the former class of tenancies also.<sup>6</sup> In Massachusetts and Maine, tenancies from year to year have been held not to exist, and all oral tenancies are strictly at will.<sup>7</sup>

<sup>1</sup> Jackson dem. Clinch v. Miller, 7 Cow. 747; Jackson v. Moncrief, 5 Wend. 26; Dubuque v. Miller, 11 Iowa, 583.

<sup>2</sup> Mere occupation of the premises will not amount to a ratification of a void lease. To that end some new promise to perform the terms of the lease, or something equivalent thereto, is necessary. McIntosh v. Lee, 57 Iowa, 356.

<sup>3</sup> Bradley v. Covel, 4 Cow. 849; Ezelle v. Parker, 41 Miss. 520; Reed v. Landon, 5 Bush, (Ky.) 21.

<sup>4</sup> Leavitt v. Leavitt, 47 N. H. 329, 340; Anderson v. Prindle, and cases *supra*; and the mere fact of payment, or admission that some rent is due, has been held evidence of such agreement: Knight v. Burnell, 3 Bing. 361; Cox v. Bent, 5 *id.* 185; and see *ante*, § 56.

<sup>5</sup> *Ante*, § 58.

<sup>6</sup> As the right to a notice to quit of a defined length was the ground upon which, notwithstanding the language of the Statute of Frauds, tenancies from year to year were construed as terms, and as this right is secured to general tenancies at will, by statute or the decisions of courts, no valid reason would seem to exist why these last should not be placed on the same footing as the former.

<sup>7</sup> Ellis v. Paige, 1 Pick. 43, but see 2 *id.* 71, n.; Davis v. Thompson, 13 Me. 209; Goodenow v. Allen, 68 Me. 204. (See also Hammon v. Douglas, 50 Mo. 434, 436.) And although the statutes of both States have required a notice to quit of fixed length, which is insisted on even

§ 62. **How determined.**—A strict tenancy at will may be determined by either party, at any time, subject to such statutory provisions as we shall presently notice; but a general tenancy at will can only be terminated by a notice to quit proportioned to the usual periods of holding.<sup>1</sup> Thus if the rent is payable quarterly, and the lessor determines his will after the commencement of a new quarter, he will lose the rent that would otherwise accrue for that quarter, and the lessee will still be entitled to emblements.<sup>2</sup> So if the lessee determines his will before the end of a quarter, he must pay the rent of the quarter in which the tenancy is determined.<sup>3</sup> But a strict tenancy at will may also be determined by implication of law; and such an implication will arise on the death of either of the parties<sup>4</sup> from acts of ownership over the property exercised by the landlord, such as entering and cutting timber or carrying away stone, making partition among liens, taking a distress for rent,<sup>5</sup> or alienating the reversion.<sup>6</sup> So

where the lease is by agreement strictly at will: *Batchelder v. Batchelder*, 2 Allen, 105; yet such tenancies are liable to defeat by act of law: *Howard v. Merriam*, 5 Cush. 563; *Withers v. Larrabee*, 48 Me. 570. This construction practically defeats the statute, as a colorable alienation, even by a lease, determines the will. *Curtis v. Galvin*, 1 Allen, 215; *Hilbourn v. Fogg*, 99 Mass. 11; *Dunshee v. Grundy*, 15 Gray, 314. In Maine it is considered doubtful whether a tenancy at will, under a verbal lease, may be a conditional estate, to be determined after a time fixed or upon the happening of a certain event, so that the tenancy will come to an end without notice at the expiration of the time or the happening of the event; the statute providing that such tenancies may be determined by thirty days' notice and not otherwise except by mutual assent. *Goodenow v. Allen*, *supra*.

<sup>1</sup> *Prickett v. Ritter*, 16 Ill. 96; *Davis v. Thompson*, 13 Me. 209.

<sup>2</sup> *Leighton v. Theed*, 1 Ld. Ray. 707.

<sup>3</sup> *Bowe's Case*, Aleyn, 4; *Walker v. Furbish*, 11 Cush. 366; *Withers v. Larrabee*, 48 Me. 570; *Whitney v. Gordon*, 1 Cush. 266. As to length of notice, see *post*, § 478.

<sup>4</sup> *Robie v. Smith*, 21 Me. 114.

<sup>5</sup> *Rising v. Stannard*, 17 Mass. 284; *Doe v. Turner*, 7 M. & W. 226; s. c. 9 *id.* 643; *Reed v. Reed*, 48 Me. 388; *Adams v. McKesson*, 53 Pa. St. 81; *Turner v. Bennett*, 9 M. & W. 643.

<sup>6</sup> *Bunton v. Richardson*, 10 Allen, 260; *Parmelee v. Oswego & Sy. R. R.*, 6 N. Y. 74; *Hayden v. Ahearn*, 9 Gray, 438; *Ball v. Cullimore*, 5 Tyrw. 753; *Ellis v. Paige*, 1 Pick. 43; *Kelly v. Waite*, 12 Metc. 300; *Pratt v. Farrar*, 10 Allen, 519; *Esty v. Baker*, 50 Me. 325.

if the tenant repudiates the tenancy<sup>1</sup> commits an act of voluntary waste,<sup>2</sup> sells or transfers his interest to another, deserts the premises, or in any other way discontinues his lawful possession, he puts an end to the tenancy. For, independently of his temporary right of possession,<sup>3</sup> a tenant of this description has no certain, indefeasible estate in the premises; his relation to the landlord is entirely of a personal character; and he has consequently no interest which he can transfer to another, or over which he can exercise any control.<sup>4</sup>

§ 63. Notice to quit generally necessary to determine. — At common law, neither a tenant at will nor by sufferance was entitled to notice to quit before he could be ejected, although a demand of possession was always required. Yet the words, "Unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to the tenant by the party entitled to the fee, were held to be a sufficient determination of his will, and equivalent to a demand of possession, so as to maintain ejectment.<sup>5</sup> And a tenant at will was even held to be a trespasser, by any unreasonable delay to remove, after the estate had been thus determined.<sup>6</sup> But the statutes of most of the United States now require formal notice to be given in either case before a tenant can be proceeded against.<sup>7</sup> We have seen that a

<sup>1</sup> *Chamberlain v. Donohue*, 45 Vt. 50; *Rich v. Bolton*, 46 *id.* 84. And see *post*, § 472.

<sup>2</sup> *Daniels v. Pond*, 21 Pick. 367; *Phillips v. Covert*, 7 Johns. 1.

<sup>3</sup> *Reckhow v. Schanck*, 43 N. Y. 448; *King v. Lawson*, 98 Mass. 309; *Clark v. Wheelock*, 99 *id.* 14.

<sup>4</sup> *Phillips v. Covert*, 7 Johns. 1; *Doak v. Donelson*, 2 Yerg. 249; *Warner v. Paige*, 4 Vt. 291; *Cooper v. Adams*, 6 Cush. 87; *Chandler v. Thurston*, 10 Pick. 209; *Daniels v. Pond*, *supra*.

<sup>5</sup> *Doe v. Price*, 9 Bing. 356; *Ellis v. Paige*, 1 Pick. 47.

<sup>6</sup> *Ellis v. Paige*, *supra*; *Rising v. Stannard*, 17 Mass. 282; *Livingston v. Tanner*, 14 N. Y. 64; *Welch v. Winterburn*, 25 Hun, 437.

<sup>7</sup> Under such a statute in Michigan, Comp. L. § 4304, it was held, that a tenant holding over, not being a tenant at will, unless holding by express or implied consent, was not entitled to the notice to quit provided for in the case of tenancies by sufferance or at will. Cooley, J. said: "The statute evidently intends a case of a holding where the occupant

vendee in possession before he has completed the purchase stands upon the footing of a tenant at will, and is entitled to a demand of possession before ejectment can be brought against him, although not to a formal notice to quit.<sup>1</sup> So a grantor who continues in possession, after the conveyance is executed, is a tenant at will to the grantee, and after a refusal to deliver possession may be treated as a disseisor and removed in a similar manner.<sup>2</sup> But where, upon the sale of a term of years it was agreed that, if the purchaser did not pay the residue of the purchase-money on a certain day, he should forfeit the instalment already paid, and should not be entitled to an assignment of the lease, it was held to operate as a clause for re-entry, on a breach of covenant in the lease; and that the vendor might maintain an action of ejectment, without either a demand of possession or notice to quit.<sup>3</sup>

#### SECTION IV.

##### A TENANCY AT SUFFERANCE.

§ 64. *Defined.*—A tenancy at sufferance arises when a man comes into possession lawfully, but holds over wrongfully, after the determination of his interest; differing in this respect from a tenant at will, where the holding is by the landlord's permission.<sup>4</sup> He has only a naked possession, stands in no privity to the landlord, cannot maintain an action of trespass against him; and, independently of the statute, has some equities which would render it unjust that he should be required to surrender immediate possession; but he cannot acquire such equities by a mere wrongful holding over which is neither assented to nor acquiesced in." *Benfrey v. Congdon*, 40 Mich. 283.

<sup>1</sup> *Right v. Beard*, 13 East, 210. See *ante*, § 25, and note; *post*, §§ 470-472.

<sup>2</sup> *Currier v. Earle*, 13 Me. 216.

<sup>3</sup> *Doe v. Sayer*, 3 Camp. 8; *Jones v. Chamberlaine*, 5 M. & W. 14.

<sup>4</sup> 4 Kent, Com. 113; *Edwards v. Hale*, 9 Allen, 462; *Abeel v. Hubbell*, 52 Mich. 37; *Smith v. Singleton*, 71 Ga. 68. While such is the common law, considerable difficulties have arisen from statutes providing for notice of one or more months to tenants at sufferance. Thus in N. Y. 2 R. S. 518; N. H., R. S. ch. 209, § 1; Ky., G. S. ch. 66, art. 6, § 1;

ute, is not entitled to notice to quit.<sup>1</sup> Nor is he liable to pay rent, for he holds by the mere neglect of the landlord to take possession, who may enter and put an end to the tenancy whenever he thinks proper.<sup>2</sup> But before entry the landlord cannot maintain trespass against such a tenant, as he may against a stranger; for, being once in by lawful title, the law supposes the continuance of a lawful possession, unless the owner, by some public act, like entry or demand, declares such a continuance to be wrongful.<sup>3</sup> If, however, the occupant has come into the estate by mere act of law, and not by an act of the party, he is, after the estate has ended, not even a tenant at sufferance, but is to be considered an intruder, *abator*, or trespasser.<sup>4</sup>

Mich., Comp. L. § 4304. The tenant cannot claim the benefit of the notice when he has asserted a title that directly, or by implication, negatives the landlord's right to terminate the tenancy. *Kunzie v. Wixcom*, 39 Mich. 384, and see *Benfrey v. Congdon*, 40 *id.* 283, as cited § 63, *ante*. In New York, the courts, to avoid the absurdity of notifying a tenant who clearly knew when his term ended, and thereby adding one or more months to it, hold that he is not at sufferance until he has held long enough to imply the landlord's assent. *Rowan v. Lytle*, 11 Wend. 617; *Smith v. Littlefield*, 51 N. Y. 539; *post*, § 718, n. 2. But this is open to the objection that such assent rather makes a tenant from year to year, *ante*, § 55. By the Kentucky statute a tenant is at sufferance for ninety days after his term, if this be for a year or more. *Mendell v. Hall*, 13 Bush, Ky. 232.

<sup>1</sup> *Livingston v. Tanner*, *supra*; *Moore v. Morrow*, 28 Cal. 551; *Hollis v. Pool*, 3 Met. 350; *Hauxhurst v. Lobree*, 38 Cal. 563.

<sup>2</sup> *Smith v. Houston*, 16 Ala. 111; *De Young v. Buchanan*, 10 Gill & J. 149; *Dixon v. Haley*, 16 Ill. 145; *Hurd v. Miller*, 2 Hilt. 540; *Delano v. Montague*, 4 Cush. 42; *Flood v. Flood*, 1 Allen, 217; *Emmons v. Scudder*, 115 Mass. 367. But he is liable in use and occupation. *Harding v. Crethorn*, 1 Esp. 57; *Bayley v. Bradley*, 5 C. B. 396; *Christy v. Tancred*, 7 M. & W. 127; *ibbs v. Richardson*, 9 Ad. & E. 849; *Wright v. Roberts*, 22 Wisc. 161. By Mass. Pub. Sts. C. 121, § 5, he is made liable for rent; but this does not apply to one who occupied in right of his wife and remains in after her estate ended. *Merrill v. Bullock*, 105 Mass. 481. See *Porter v. Hubbard*, 134 Mass. 233.

<sup>3</sup> Co. Lit. 270, 576; *Jackson v. Parkhurst*, 5 Johns. 128; *Jackson v. McLeod*, 12 *id.* 182.

<sup>4</sup> 2 Bl. Com. 150; Co. Lit. 57, b; 2 Inst. 134. Thus a woman who remains in her former husband's house after a divorce from him. *Brown v. Smith*, 83 Ill. 291. But a wife who occupied with her husband prem-



§ 65. **Landlord's option.** — **Tenant may become tenant at will.** — If a tenant for years surrenders his lease, and then holds over, he will become either a tenant by sufferance or a *disseisor*, at the option of the landlord.<sup>1</sup> So an under-tenant, who is in possession of the estate at the termination of the original lease, and is permitted by the reversioner to hold over, is *quasi* a tenant at sufferance; and the mere fact of occupation, coupled even with the payment of rent for the period of his occupation, does not raise the presumption of a demise for years, unless there is some evidence of an agreement to demise the term.<sup>2</sup> A tenant at will, we have seen, acquires possession by the consent of the owner; and if such consent can be inferred from any act of the landlord, a tenant at sufferance will become a tenant at will, or from year to year, according to circumstances.<sup>3</sup> As in the case of a tenant for years holding over, if the lessor receives rent, or the lessee is permitted to continue on the land for a year, the tenancy by sufferance will be turned into a tenancy from year to year.<sup>4</sup> But where a tenant holds over after the determination of an estate for years; or a person selling land agrees to deliver possession on a particular day, and afterwards refuses to do so, and continues in possession, he is, in either case, to be considered a mere tenant at sufferance.<sup>5</sup>

ises hired by him, does not become at sufferance by remaining after his term ends, but his tenancy at sufferance still continues. *Knowles v. Hull*, 99 Mass. 562.

<sup>1</sup> *Pennington v. Morse*, Dy. 61, b.

<sup>2</sup> *Simkin v. Ashurst*, 1 C. M. & R. 261.

<sup>3</sup> *Rowan v. Lytle*, 11 Wend. 619.

<sup>4</sup> *Doe v. Stennett*, 2 Esp. 717; and see *ante*, §§ 55, 56.

<sup>5</sup> *Wilde v. Cantillon*, 1 Johns. Cas. 123; *Hyatt v. Wood*, 4 Johns. 150; *Hollis v. Pool*, 3 Met. 350; *Hildreth v. Conant*, 10 *id.* 298; *Rising v. Stannard*, *supra*. After a sale of mortgaged premises by a mortgagee or his assigns pursuant to a power of sale contained in the mortgage, the mortgagor, if he thereafter remains in possession, is a tenant at sufferance. *Kingsley v. Ames*, 2 Met. 29; and see *Howard v. Merriam*, 5 Cush. 576; *Doe v. Maisey*, 8. B. & C. 767; *Doe v. Giles*, 5 Bing. 421. So a *cestui que trust* of the use and improvement of an estate, holding after his interest has ceased, becomes a tenant at sufferance. *Godfrey v. Walker*, 42 Ga. 562. And see *Brown v. Smith*, *supra*, where the different classes of tenants at sufferance are enumerated.



## SECTION V.

## DEMISE OF LODGINGS.

§ 66. **Status of the Occupant.** — The rapidly growing frequency of the occupation of “flats” or “suites” — subdivisions of a house or other entire structure — has given rise to many questions and numerous cases, in determining whether the occupant is technically a tenant or not; that is, whether he has an interest in the realty, or only a personal contract. While there can be a tenancy of real estate, properly, though in a single room,<sup>1</sup> or in furnished rooms;<sup>2</sup> yet this can only be created by clear terms of demise.<sup>3</sup> Where these flats are separate tenements, though under one roof, yet if the owner does not reside as such on the premises, or retain control of the whole, a letting will create a tenancy, and interest in real estate, though there is an outer door or gate in charge of a porter, as the tenants have an equal control thereof, or easement therein;<sup>4</sup> and may maintain trespass *qu. cl. fregit* for any

<sup>1</sup> Coke, 3 Inst. 65; *Fenn v. Grafton*, 2 B. N. C. 617; *Izon v. Gorton*, 5 *id.* 1; *Stockwell v. Hunter*, 11 Met. 448; and see cases *post*, § 520, n.

<sup>2</sup> *Newman v. Anderton*, 5 B. & P. 224; *Smith v. Marrable*, 11 M. & W. 5; *Wilson v. Finch Hatton*, 2 L. R. Exch. Div. 336; *Mechelen v. Wallace*, 7 Ad. & E. 49. And the landlord's agreement to supply furniture as part of the demise is within the Statute of Frauds, and must be in writing. *Ib.*

<sup>3</sup> Cases *supra*; *Cook v. Humber*, 11 C. B. n. s. 44. *Edge v. Strafford*, 1 C. & J. 391; and *Inman v. Stamp*, 1 Stark, 12, are put on this ground in *Wright v. Stavert*, 2 E. & E. 721, 725.

<sup>4</sup> *Evans v. Finch*, Cro. Car. 473, where chambers in the Inns of Court were held a tenement; *Wright v. Stockport*, 5 M. & G. 33; *Rex v. Unsworth*, 5 A. & E. 261; *Judson v. Lockett*, 2 C. B. 197; *Toms v. Lockett*, 5 *id.* 23; *Downing v. Lockett*, *id.* 40; *Score v. Huggett*, 7 M. & G. 95; *Swain v. Mizner*, 8 Gray, 182; *Henrette v. Booth*, 15 C. B. n. s. 100; *Young v. Boston*, 104 Mass. 95. “Flats are as much separate dwellings as ordinary adjoining houses are, and it makes no difference whether the structure is divided vertically or horizontally.” *Stamper v. Sunderland*, L. R. 3 C. P. 388. “The possession of the street door may be taken as a criterion. If exclusive control is retained by the landlord, so that the tenants could only come in and go out with his assent and permission,

unlicensed entry by the landlord.<sup>1</sup> A lodger, on the contrary, — though the term is not a technical one, — means one who occupies a portion of a tenement which is under the control or in the occupancy of another. He cannot have trespass *qu. cl. fregit*, if entered upon, and is not liable for rent or in use and occupation, but can only sue and be sued for a breach of his agreement.<sup>2</sup> His agreement is not within the Statute of Frauds, and his rights do not therefore differ from those of a boarder in a hotel or boarding-house, who has no interest in the realty even though he has a contract for specific rooms.<sup>3</sup> The respective rights of the owner and of the lodger are therefore determined, not by the law of landlord and tenant, but by the principles of personal contract.<sup>4</sup>

§ 67. **Lodgers quasi Tenants.** — Lodgers are entitled, therefore, to the privileges of tenants, though on a different ground; and if a man takes lodgings on the first or second floor of a house, he has a right to the use of the door-bell, the knocker, the skylight of the staircase, and the water-closet, unless it is otherwise stipulated at the time of taking such lodgings; and,

then it may be said that they are mere inmates and lodgers, and not lessees." See Cockburn, C. J. *Queen v. St. Geo. Union*, L. R. 7 Q. B. 90, 97, 98. In *Porter v. Merrill*, 124 Mass. 534, it was held that a lease of specified rooms in a house containing a restaurant was valid, although the lessor undertook to serve a private table and to furnish certain other accommodations to the lessee, and imposed certain restrictions on the manner of the use and occupation of the rooms.

<sup>1</sup> *Queen v. St. Geo. Union*, *supra*, p. 97.

<sup>2</sup> *Lee v. Gansel*, Cowp. 1; *Fludier v. Lombe*, Co. T. Hardw. 307. "Neither the house, nor even any part of it, can properly be said to be in the tenure and occupation of the lodger." Per Hardwicke, Ld. Ch. *So Doe v. Laming*, Ry. & M. 36; *Dobson v. Jones*, 5 M. & G. 112; *Davis v. Waddington*, 7 *id.* 85; *Wansey v. Perkins*, *id.* 151; *Monks v. Dykes*, 4 M. & W. 567; *Smith v. Lancaster*, L. R. 5 C. P. 246; *Brown v. McGowan*, *id.* 239; *Hartley v. Banks*, 5 C. B. N. S. 40; *Roads v. Trumpington*, L. R. 6 Q. B. 56, 62.

<sup>3</sup> *White v. Maynard*, 111 Mass. 250; *Wright v. Stavert*, *supra*; *Wilson v. Martin*, 1 Denio, 602; *Polack v. Shafer*, 46 Cal. 270; *Brown v. McGowan*, *supra*; *Ambler v. Skinner*, 7 Rob. (N. Y.) 561.

<sup>4</sup> *Kirkman v. Jervis*, 7 D. P. C. 678. Here the landlord's misconduct having caused the lodger to leave, the latter was held to pay compensation during the time he was actually occupying.

if the landlord deprives him of the use of either, an action lies.<sup>1</sup> He is also subject to the same liabilities as other tenants; and is not justified in quitting his apartments without giving proper notice, even from a fear, however reasonable, that his goods may be seized for the landlord's rent.<sup>2</sup> But if his goods should be distrained together with those of the lessee, and sold first, the landlord having been notified of his ownership of them, he may sue for damages for an excessive distress, if the tenant's goods turn out to be sufficient to satisfy the rent due and the charges.<sup>3</sup> With respect, however, to legal process, a marked distinction exists between a lodger and a tenant, properly so called. While for the purpose of his personal protection the premises in the former's occupancy may be regarded as a house in case of burglary, yet in the execution of civil process, they are subject to be entered with force by the officer;<sup>4</sup> whereas the separate apartments or flat in the occupancy of the tenant in a tenement house or hotel cannot, even though the outer door is peaceably entered.<sup>5</sup>

<sup>1</sup> Underwood *v.* Burrows, 7 C. & P. 26.

<sup>2</sup> Rickett *v.* Tullick, 6 C. & P. 66; Griffith *v.* Hodges, 1 *id.* 419. As to the rule of damages against a lodger removing and refusing to pay rent, see Cummins *v.* Hanson, 10 Daly, 493.

<sup>3</sup> Wilkinson *v.* Ibbett, 2 F. & F. 300; Fisher *v.* Alger, 2 C. & P. 374.

<sup>4</sup> Tracy *v.* Talbot, 6 Mod. 214; 1 Hawk. P. C. 163, § 15; Lee *v.* Gansel, *supra*.

<sup>5</sup> Swain *v.* Mizner, 8 Gray, 182.

## CHAPTER III.

## THE DURATION OF A TENANCY.

## SECTION I.

## THE COMMENCEMENT OF A LEASE.

§ 68. **Fixed by Delivery of Deed, and Entry.** — At common law, livery of seisin or an actual manual tradition of the land was necessary to complete every grant of an estate of inheritance, or for life; although it was not required for the purposes of a lease for years, or other mere chattel interest. But this distinction has been abolished in most of the United States, and a simple delivery of the deed substituted in place of it; from which time all grants, whether for life or for years, now take effect. In leases for years, however, an actual entry is still necessary to vest possession in the lessee; for the bare lease gives him, as we have seen, only a right to enter, or an *interesse termini*. When he enters in pursuance of that right, he is then, and not before, in possession of the term, and becomes a complete tenant for years. And, in reference to the obligations of the parties, and regarding the lease as a contract, if the time from which the term is to commence does not otherwise appear, it will be understood as commencing from the time the papers are dated; and, if not dated, then from the time they were delivered.<sup>1</sup> If there are no writings, the commencement of the tenancy will be governed

<sup>1</sup> Thus where a lease of a city lot was made for a term of years, and afterwards, for the purpose of increasing the depth of the lot, another lease was made of land adjoining the first lot, in the rear, the latter lease expiring at the same time as the former and containing like covenants; *semble* that these are separate leases. *Livingston v. Sage*, 95 N. Y. 289.

by any express day fixed by the parties. except that the interest of the tenant will only begin upon entry ; and if there has been no such day fixed, the tenancy will commence with the tenant's entry, and not from any particular quarter-day.<sup>1</sup>

§ 69. **Of Payment of Rent, Effect to fix. — Other Circumstances.** — A receipt for rent, up to a particular day, is *prima facie* evidence of the commencement of a tenancy at or previous to that day. And, if a tenant enters in the middle of a quarter, and afterwards pays rent to the beginning of the succeeding quarter, and from that time pays half-yearly, his tenancy will be deemed to have commenced from the quarter-day to which he paid up.<sup>2</sup> But where a tenant, under a written lease, continues to hold over after the expiration of his tenancy, and assigns his interest to another person, the new tenancy, if recognized by the landlord, will be held to have commenced at the time the original lease commenced, although the assignee came in on a different day.<sup>3</sup> Notice to

<sup>1</sup> Church v. Gilman, 15 Wend. 656; Co. Lit. 46, a; Jackson v. Bard, 4 Johns. 230; Kemp v. Derrett, 3 Camp. 510. In Inman v. Stamp, 1 Stark. 12; Edge v. Strafford, 1 C. & J. 391; it was held that parol leases, though for less than three years, created no rights or obligations whatever as leases before entry, because obnoxious to § 4 of the Statute of Frauds as agreements exceeding a year. See also Tully v. Dunn, 42 Ala. 262; Horsey v. Graham, 12 W. R. 141. But in Huffman v. Starkes, 31 Ind. 474; Birckhead v. Cummings, 33 N. J. 44, this section was held not to apply to leases within the exception of three years, and that these were accordingly complete as to all but mere possessory rights as soon as made.

<sup>2</sup> Doe v. Johnson, 6 Esp. 10. And the presumption in England is, that the holding is intended to be in accordance with the regular quarter-days stated in the lease, rather than with the date of the lease: Sandhill v. Franklin, L. R. 10 C. B. 342; but if no regular quarter-days are named, the date of the lease controls as to when rent is payable, and notice to quit must be given: Doe v. Matthews, 11 C. B. 675. It has been held in New York that although a tenancy begins in the middle of a quarter, yet if by agreement the rent is payable on the regular quarter days, or payments are in fact so made, then the year will, according to circumstances, date either from the previous or succeeding quarter-day. Tyng v. Theological Seminary, 46 N. Y. S. C. 250.

<sup>3</sup> Per Ld. Ellenborough, in Doe v. Samuel, 5 Esp. 174. So where a lessee whose term began and ended at midsummer sublet for a year from

quit on a particular day is no evidence of a holding from that day.<sup>1</sup> And, when the premises contained in a demise consisted of a dwelling-house and other buildings, which were to be used for the purpose of carrying on a manufacture, a few acres of meadow and pasture lands, together with all water-courses, &c., which the tenant held under a written agreement for a lease, to commence, as to the meadow, from the 25th December, then last past, as to the pasture ground from the 25th March then next, and as to the houses, mills, and all the rest of the premises, from the 1st of May, the court held that the substantial time of entry was the 1st of May, because the principal subject of the demise was the house and buildings for the purpose of the manufacture, to which everything else in the demise was merely auxiliary.<sup>2</sup>

§ 70. **Tenancy for Years to have fixed Beginning.** — An estate for life needs no expression of the time at which it is to commence, because it cannot, at common law, commence *in futuro*, nor can its duration be ascertained; but it is of the very essence of a term of years to be fixed and determined; and, therefore, unless some certain beginning or event is referred to by which the period of its commencement may be ascertained, it will be void for uncertainty.<sup>3</sup> But a lease, to

Michaelmas, and the subtenant acknowledged the new lessee whose term began at midsummer, it was held that the sublessee's holding under such new lessee was still from Michaelmas to Michaelmas. *Kelly v. Patterson*, L. R. 9 C. B. 681.

<sup>1</sup> *Doe v. Forster*, 13 East, 405.

<sup>2</sup> *Doe v. Watkins*, 7 East, 551; *Steele v. Mart*, 4 B. & C. 272; *Doe v. Benson*, 4 B. & A. 588. A lease was dated Jan. 25, 1853, to run from the first day of April next, for and during and until the full end and term of five years thence next ensuing, yielding and paying therefor unto the lessor the yearly rent of four thousand dollars, in equal quarterly payments, — to wit, on the first days of April, July, October, and January, in each and every year during the said term; and it was held that the term commenced on the first day of April, 1853, and included that day. *Deyo v. Bleakley*, 24 Barb. 9.

<sup>3</sup> 1 Prest. Est. 201; Bac. Abr. Leases (L.), 3. An agreement to convey seventy acres of land without describing them or designating the place, is void for uncertainty; and a clause giving some clew to the identity of a small part only, does not help it. *Rollin v. Pickett*, 2 Hill, 552.

commence or terminate on a contingency which must happen, is valid; for then its duration is made certain.<sup>1</sup> Thus, a lease from the day of the lessor's death until the 1st of May, 1629, was held to be good for so much of the term as remained after the lessor's death.<sup>2</sup> And there is no objection that a term of years is to commence as of a day which is past; for in that case, the lease will take effect, in point of computation, from that day, but in point of interest, from the delivery of the instrument.<sup>3</sup>

§ 71. **Impossible Dates.** — As to an impossible or uncertain date, there appears to be this nice distinction made in the books, that if a lease be made to begin from an impossible date, — as from the 30th day of February, — it takes effect from delivery; but where the limitation is uncertain, — as a lease made the 10th of October, to hold from the 20th day of November, without saying what November is meant, — the lease is void; because the limitation is part of the agreement, and the court cannot determine it, not knowing the terms of the contract.<sup>4</sup> Yet, where a lease was dated 25th March, 1783, to hold from the 25th March now last past, and it was proved that the deed was not executed until some time after date, and rent was reserved from March 25th, 1783, it was held that the term commenced on the 25th March, 1783, and not on the 25th March, 1782;<sup>5</sup> for, though there may appear to be no certainty of years in a lease, yet, if, by reference to a certainty, it may be made certain, it is sufficient.<sup>6</sup>

So *Patterson v. Hubbard*, 30 Ill. 201; *Dingman v. Kelly*, 7 Ind. 717; *Reed v. Lewis*, 74 *id.* 433.

<sup>1</sup> *Goodright v. Richardson*, 3 T. R. 462. The day fixed in the lease, on which the tenant is to have possession of the premises, is so much of the essence of the contract, that, if the lessor refuse to give the lessee possession on that day, the latter may abandon the contract. *Spencer v. Burton*, 5 Blackf. 57.

<sup>2</sup> *Child v. Baylie*, Cro. Jac. 459.

<sup>3</sup> *Moore v. Musgrave*, Hob. 18; *Enys v. Donnithorne*, 2 Burr. 1192.

<sup>4</sup> *Bac. Abr. Leases (L.)*, 1. A lease from the — day of — 1866, for eighteen months, will be held to continue after July 1st, 1867. *Huffman v. McDaniel*, 1 Oregon, 259.

<sup>5</sup> *Steele v. Mart*, 4 B. & C. 272.

<sup>6</sup> *Shep. Touch.* 272.

§ 72. **Future Possession. — Interesse Termin.** — When an estate for years is made to commence at a day to come, or on the happening of a particular event, it is, in either case, called, as we have said, an *interesse termini*, or a right to the possession of a term at a future time. Such a demise vests in the lessee a complete right to the possession of the premises, on the day fixed by the agreement for the commencement of the term; and, being a mere chattel interest, was never required to be created by feoffment and livery of seisin.<sup>1</sup> But an estate for life, whether it lie in livery or in grant, cannot begin at a day to come, because a freehold may not be placed in abeyance.<sup>2</sup> And, since no estate of freehold can commence *in futuro*, a lease to commence after the death of a lessor, or of a lessee for life, is not good, unless there be some subsisting estate, which will fill the intermediate space.<sup>3</sup> If a term of years is granted in possession, and a second lease is afterwards made, to commence at the expiration of the existing lease, no reversion will pass by the second deed, nor will the second lessee be entitled to any interest under it, except a mere *interesse termini*, and the lessor will consequently be entitled to the rent reserved by the first lease, and may distrain for it in the same manner as any other reversioner.<sup>4</sup> But where a lease under seal is concurrent with the first lease, it conveys the reversion, and not a simple *interesse termini*; and though no entry is made under it, the estate vests, and the right to distrain for rent follows.<sup>5</sup>

<sup>1</sup> Winter v. Loveday, 1 Comyn, 89.

<sup>2</sup> 1 Prest. Est. 117; 2 Bl. Com. 314; Singleton v. Bremar, 4 McCord, 12.

<sup>3</sup> 1 Prest. Est. 231; Weale v. Lower, Pollexf. 55.

<sup>4</sup> Smith v. Day, 2 M. & W. 684. So where lessee held over, the original lessor, and not one to whom he had granted a lease and who was entitled to an *interesse termini*, recovered the double rent given by statute. Blatchford v. Cole, 5 C. B. N. S. 514; so surrender to produce merger must be made to the lessor, not to the owner of an *interesse termini*. Edwards v. Wickwar, 35 L. J. N. S. 309.

<sup>5</sup> Colbourne v. Mixstone, 1 Leon. 129. Affirmed, Doe v. Rawlins, 5 B. & C. 121; Harmer v. Bean, 3 Carr. & K. 307.



## SECTION II.

## THE TERMINATION OF A LEASE.

§ 73. **Terms not limited by Law.** — Terms were originally of short duration ; and Lord Coke states that, by the ancient law of England, they could not exceed an ordinary generation of forty years, for the reason that, if leases could be made for a longer period, men might be disinherited. This doctrine of the common law, however, had become antiquated even in his day, and was soon after abolished altogether.<sup>1</sup> There is now no limitation to the extent of a term of years, either in England or the United States.<sup>2</sup>

§ 74. **Perpetual and Conditional leases.** — Leases may also be of perpetual duration ; and these are usually in the form of a grant of land in fee, reserving the payment of an annual rent, instead of a present consideration ; and of this class the New York manor-leases, and the fee-farm leases in Pennsylvania, are specimens.<sup>3</sup> Or they may be leases to continue so long as the

<sup>1</sup> Co. Lit. 45, b ; 46, a ; Theobalds v. Duffoy, 9 Mod. 101.

<sup>2</sup> In New York, however, by the Constitution of 1846, Art. 1, § 14, agricultural leases are good only for twelve years. These are, however, only such as are held on the reservation of a periodical rent or service to be paid as compensation for the use of the estate granted. It is still competent to make a grant for such a purpose, for a life or lives, upon a good consideration to be paid for the estate, which may be made payable all at once, or by instalments, or in services, so that it be not paid by way of rent ; that is, of rent according to the common-law definition of that term. Parsell v. Stryker, 41 N. Y. 480. And there seems to be no objection to a longer lease of such lands where their use is restricted in express terms to other than agricultural purposes. Odell v. Durant, 62 N. Y. 524. An agricultural lease for more than twelve years is not valid for twelve years but absolutely void. And where two leases of the same premises were executed at the same time, and upon the same terms and consideration, one for eight, and another to take effect upon the expiration of the first, for twelve years, it was held, Church, C. J., dissenting, that the two leases were to be construed together as if contained in the same instrument, and were void. Clark v. Barnes, 76 N. Y. 301.

<sup>3</sup> *Ante*, § 50 ; *post*, §§ 261, 284, 285, 370, 440, &c.

lessee shall continue to pay the rent, and perform the covenants contained in them; thus, a demise to A. B., his heirs and assigns, for such a term of time as he pays rent,—he, on his part, covenanting for himself and his heirs to pay rent and perform covenants,—is a perpetual lease; and can only be terminated by the mutual agreement of the parties, or until the lessor shall elect, on default of the lessee to pay rent and perform the covenants, to consider it forfeited.<sup>1</sup>

§ 75. **Term to be fixed.—How ascertained.**—The continuance of a term of years constitutes an essential part of the contract, and must be ascertained with certainty at its commencement; otherwise, the lease will create but a tenancy at will or from year to year, if it be not wholly void. As if it be to hold until a child, then unborn, shall be of full age; or so long as a certain individual shall continue parson of Dale; this will, in either case, constitute but a tenancy at will, because of the uncertainty that the child will ever arrive at that age, or that the individual in question will continue parson of Dale.<sup>2</sup> The duration of a lease may, however, be defined, either by an express enumeration of years, or by reference to some collateral or extrinsic circumstance.<sup>3</sup> It may also be reduced to a cer-

<sup>1</sup> *Folts v. Huntley*, 7 Wend. 210; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Wallace v. Harmstad*, 44 Pa. St. 492; *Phila. Lib. Co. v. Beaumont*, 39 *id.* 43. So a lease “as long as water runs, or grass grows,” is good as a perpetual lease. *White v. Fuller*, 38 Vt. 193. In *Arms v. Burt*, 1 Vt. 306, it is said to convey a fee. So a lease during the time the property shall be used for a certain purpose, it being granted for a present money consideration, is held to be a lease in perpetuity at the will of the lessee and to convey a base or terminable fee. *Delhi School Dist. v. Everett*, 52 Mich. 314. Per Cooley, J. But where the words “or as long as we selectmen have a right to lease” are added, the lease is good only for five years, that being the extent of their power to lease. *Lemington v. Stevens*, 48 *id.* 38.

<sup>2</sup> *Bishop of Bath’s Case*, 6 Co. 35. In *Murray v. Cherrington*, 99 Mass. 229, a lease with no other termination indicated than that the lessor was to have the right to reoccupy after two years, was held void as a lease, and to enure only as a tenancy at will. And see *ante*, § 60, n. 3.

<sup>3</sup> *Horner v. Leeds*, 1 Dutch. 106. Where the years are expressly enumerated, the words “expiration of the term,” in the lease refer to the expiration of the period of years, and liabilities to accrue at the expira-

tainty by matter *ex post facto*. Thus, if it is intended to grant a term for years, which is to be dependent for its continuance upon the duration of a life, it must be granted for a stated term of years, if the life shall so long continue; as for the term of ninety-nine years, if a certain person shall live so long; for there the utmost limit of the term is marked out, subject to its sooner determination on a collateral event. And though formerly otherwise, on the ground that there could be no remainder of a term after a life-estate therein, it was afterwards settled that the unexpired residue of the term, taken in the sense of time, might be limited over on the decease of a life-tenant. But it may be granted to a man for life; and a subsequent lease may be granted to another for sixty years, to commence after the decease of the first, or to commence immediately, and run in computation of time concurrently with the first term, subject to postponement, as to possession, until the decease of the first person.<sup>1</sup> A grant, however, for the life of one not in existence, is void; but if for the lives of A., B., and C., and there should be no such person as C., it is good for the lives of A. and B.<sup>2</sup>

§ 76. **Ascertained by extrinsic Reference.** — The duration of a lease may, as we have said, be defined with reference to a certainty; as, for instance, to another lease already in existence, as a lease to A. for so many years as B. has in the manor of Dale; here if B. has ten years' interest in that manor, A. will take a term of the same extent. But when a

tion of the term do not attach until the end of the term as limited, although the lessee's estate may be sooner determined. *Finkelmeier v. Bates*, 16 N. Y. S. C. 433; s. c. on appeal, 92 N. Y. 172; and see *Crosby v. Moses*, *id.* 634.

<sup>1</sup> *Shep. Touch.* 274; *Wright v. Cartwright*, 1 Burr. 282; *Rector of Chedington's Case*, 1 Co. 155, a.

<sup>2</sup> *Doe v. Edwards*, 1 M. & W. 553. So a lease by selectmen, whose power was limited to five years, "as long as water runs or wood grows, or as we have power to lease," is good for five years. *Lemington v. Stevens*, 48 Vt. 88. Particular care should be observed in the use of the particles *and* and *or*; for a lease for ninety-nine years, if A. and B. so long live, is determinable by the death of either A. or B.; but a lease, if A. or B. so long live, lasts till the death of the survivor of them. *Lord Vaux's Case*, Cro. El. 269; *Elliott v. Turner*, 2 C. B. 461.

reference of this kind is made, it must be to a thing which has express certainty at the time the lease is made, and not to a mere possibility or casual certainty. As in the case above referred to, where a lease is made for so many years as a man shall continue parson of Dale, this cannot be made certain, for nothing can be less certain than the time of his death, or the period of his ceasing to be parson.<sup>1</sup> Yet a lease which does not fix the exact period at which the tenancy is to end, may be sufficient for the particular time in it which is certain.<sup>2</sup> So a term may be demised subject to a contingent sooner determination of it by a collateral event, as by the exercise of the right of eminent domain;<sup>3</sup> or by the lessor's selling the property;<sup>4</sup> or by any similar condition.<sup>5</sup>

§ 77. *Ascertained by Matter ex post facto.*—A term originally uncertain may also be rendered certain by matter *ex post facto*. Thus it may be granted for so many years as a particular person shall name; and the lease, though uncertain at the beginning, will be valid *ab initio*, after the naming of the years.<sup>6</sup> A demise, “not for one year only, but from year to year,” constitutes a tenancy for two years, at least, and is not determinable by a notice to quit at the expiration of the

<sup>1</sup> Bishop of Bath's Case, 6 Co. 34, b; Co. Lit. 45, b.

<sup>2</sup> Gwynne v. Mainstone, 3 C. & P. 302. A lease for seven, fourteen, or twenty-one years, as the lessee shall think proper, is a good lease for seven years, whatever it may be for the fourteen or twenty-one years. Ferguson v. Cornish, 2 Burr. 1032. It is for the longest period, determinable at either of the earlier dates. Goodright v. Richardson, 3 T. R. 463, n. A lease for twenty-one years, determinable at the end of seven or fourteen, if the parties so think fit, is not determinable without the joint assent of both parties. Fowell v. Tranter, 3 H. & C. 458.

<sup>3</sup> Munigle v. Boston, 3 Allen, 230.

<sup>4</sup> Knowles v. Hull, 97 Mass. 206.

<sup>5</sup> Shaw v. Hoffman, 25 Mich. 162; Flagg v. Drew, 99 Mass. 18; Cook v. Bisbee, 18 Pick. 527. So may a tenancy at will. Ashley v. Warner, 11 Gray, 43; Thurber v. Dwyer, 10 R. I. 355. And a lease given during the absence of the owner from the country, by an agent having authority to take charge of the land while he was gone, and make it pay the best way he could, was held to be terminable by the owner on his return. Antoin v. Belknap, 102 Mass. 193.

<sup>6</sup> Goodright v. Richardson, 3 T. R. 463.

first year.<sup>1</sup> Or if a man makes a lease for years, without saying how many, it is good for two years; for more than this there is no certainty, and for less there can be no sense in the words.<sup>2</sup> But a lease to hold from the first day of April, from year to year, so long as the parties agree, is not necessarily a lease for more than one year;<sup>3</sup> but if it be from year to year, so long as the tenant pays rent or the landlord has power to let, it is void.<sup>4</sup> In the city of New York, if no time is agreed upon as to its duration, it is a lease to continue until the first day of May next after possession under the agreement shall commence; and the rent under it is payable at the usual quarter-days for the payment of rent in that city, unless otherwise expressed in the agreement.<sup>5</sup> If a lease is made for a month or months, calendar months are usually intended.<sup>6</sup> But, by the English law, a month means a lunar month of twenty-eight days, or four weeks; and a lease for twelve months has therefore been held to be for forty-eight weeks only.<sup>7</sup>

<sup>1</sup> *Denn v. Cartright*, 4 East, 29.

<sup>2</sup> *Bac. Abr. Leases (La.)*, 3.

<sup>3</sup> *Fox v. Nathans*, 32 Conn. 351.

<sup>4</sup> *Wood v. Beard*, 2 L. R. Exch. Div. 80. Where the lease is until the landlord can sell the premises, it ends upon such sale, and notice to quit is unnecessary. *Clark v. Rhodes*, 79 Ind. 342. So where the letting is until the tenant can find another place. *Hoffmann v. McCollum*, 98 *id.* 326.

<sup>5</sup> 1 R. S. 744, § 1. The statute does not apply to a case where a tenant enters without any agreement as to the terms of hiring, and remains for a series of years, paying rent monthly in advance, it being in such a case a monthly hiring. *Wilson v. Taylor*, 8 Daly, 253.

<sup>6</sup> 1 N. Y. R. S. 606, § 4; 1 Hill, Abr. 118, n; *Avery v. Pixley*, 4 Mass. 460; *Hardin v. Major*, 4 Bibb, 105; *Gross v. Fowler*, 21 Cal. 392; *Strong v. Birchard*, 5 Conn. 361; *Brewer v. Harris*, 5 Gratt. 298; *Sheets v. Selden*, 2 Wall. 177.

<sup>7</sup> 2 Bl. Com. 141; 6 T. R. 224; *Stackhouse v. Halsey*, 3 Johns. Ch. 74; *Parsons v. Chamberlin*, 4 Wend. 512; *People v. Mayor*, 10 *id.* 393; *Simpson v. Margitson*, 11 Q. B. 23; *Rogers v. Hull Dock Co.*, 11 L. T. n. s. 42, 463; 10 Jur. n. s. 1245. A distinction has been held between twelve months and a twelvemonth; and the latter has been held to mean a year. *Catesby's Case*, 6 Co. 61. Calendar months agree with those of the Gregorian calendar, or the twelve well-known months of the year; but lunar months, as stated in the text, consist of twenty-eight days only. The latter computation was used by the Greeks and Romans, and was probably introduced into the common law of England from the codes of those countries.

§ 78. **Terminal Days, Rule as to.** — It was formerly held, by following strictly the words employed, that a lease “from the day of the date” excluded, while “from the date” included, the first day, in point of computation;<sup>1</sup> or, as the rule is sometimes stated when the computation is “from” a day, that day is to be excluded, but when “from” an act, the day of the act is included.<sup>2</sup> The strict construction in the first of these rules was qualified in later cases, and the day was included whenever its exclusion would have produced a forfeiture or estoppel; or have defeated the clear intention of the parties apparent from other portions of the instrument;<sup>3</sup> or where some local custom controlled.<sup>4</sup> But if no such reasons existed

<sup>1</sup> Clayton’s Case, 5 Co. 1; Hatter v. Ash, 1 Ld. Ray. 84; Co. Lit. 46, b; the word *datus* signifying delivery; but *datus*, or date, now means day. Styles v. Wardle, 4 B. & C. 908; Johnson v. Stewart, 11 Gray, 181. Where no other time is fixed for the lessee’s interest to begin, it will begin from the date of the lease. Keyes v. Dearborn, 12 N. H. 52. But a lease may commence from one date in point of interest, and another in point of computation. Enys v. Donnithorne, 2 Burr. 1190. So see Crusoe v. Bugby, 3 Wils. 234. In this case the *term* only begins when the interest vests. Thus, where the lease was to cease if any accident occurred during the term, and the lease was to commence June, 1851, but was not actually executed until November, 1852, an accident which occurred in September, 1851, was held not within the term. Jervis v. Tomkinson, 1 H. & N. 195.

<sup>2</sup> Blake v. Crowninshield, 9 N. H. 304; Ewing v. Bailey, 4 Scam. 420; Castle v. Burditt, 3 T. R. 623. So where a lease demised a term of years “from the first day of September now next ensuing,” and reserved a rent payable “by equal quarter-yearly payments,” the first payment “to be made on the first day of December now next ensuing,” it was held that the rent, though payable December 1, was not legally due, and consequently not subject to garnishment, until after midnight of December 1. Ordway v. Remington, 12 R. I. 319.

<sup>3</sup> Pugh v. Duke of Leeds, Cowp. 714; Lester v. Garland, 15 Ves. 248; Windsor v. China, 4 Greenl. 298; Sims v. Hampton, 1 S. & R. 411; Bennett v. Nichols, 4 T. R. 121; Wilkinson v. Gaston, 9 Q. B. 137; Pellew v. Wonford, 9 B. & C. 134; Sands v. Lyon, 18 Conn. 30; People v. Robertson, 39 Barb. 9.

<sup>4</sup> Thus, in New York: Wilcox v. Wood, 9 Wend. 346; Connecticut: Fox v. Nathans, 32 Conn. 348; Pennsylvania: Marys v. Anderson, 24 Pa. St. 272; Duffy v. Ogden, 64 *id.* 240; McGowan v. Lennest, 1 Brewst. 397; Massachusetts: Butler v. Fessenden, 12 Cush. 78, as explained in Bemis v. Leonard, 118 Mass. 502; and other States there referred to.

the day was excluded.<sup>1</sup> And as the rule is now generally laid down, one terminus will be excluded and the other included, in the computation of time, according to the circumstances and the apparent intention of the parties.<sup>2</sup>

§ 79. *Conflicting Authority as to.* — The second of the rules above stated has not been so generally followed. It seems, however, to be law in several of the United States,<sup>3</sup> while in others, in the United States courts, and probably in England also, after some conflict of decisions, it is rejected.<sup>4</sup> But gen-

<sup>1</sup> *Bigelow v. Willson*, 1 Pick. 485; *Wiggin v. Peters*, 1 Met. 127; *Atkins v. Sleeper*, 7 Allen, 487; *Rand v. Rand*, 4 N. H. 267, 276; *Bemis v. Leonard*, *supra*; *Sheets v. Selden*, 2 Wall. 190; *Isaacs v. Roy. I. Co.*, L. R. 5 Exch. 296; *Styles v. Wardle*, 4 B. & C. 908; *Pellew v. Wonford*, 9 *id.* 184; *Ackland v. Lutley*, 9 Ad. & E. 879; *Webb v. Fairmaner*, 3 M. & W. 473; *Gorst v. Lowndes*, 11 Sim. 434.

<sup>2</sup> *Farwell v. Rogers*, 4 Cush. 460; *Cornell v. Moulton*, 3 Denio, 12; *Judd v. Fulton*, 10 Barb. 117; *Sheets v. Selden*, *supra*; *Higgins v. Halligan*, 46 Ill. 173; *Duffy v. Ogden*, *supra*. Thus "between" as a rule excludes. *Atkins v. Boyls. I. Co.*, 5 Met. 439. But where rent was payable on the first of each month, an assignment August 31st of all rents until October 1st was held to include the rent due on that day. *Kendall v. Kingsley*, 120 Mass. 94; *Isaacs v. Roy. I. Co.*, *supra*. The distinction has sometimes been attempted that where an interest is to pass, the day of the date is included. 4 Kent, Com. 95, note a; *Lysle v. Williams*, 15 S. & R. 135; *Donaldson v. Smith*, 1 Ashm. 197; but this was denied in *Farwell v. Rogers*, 4 Cush. 460; is *contra* to every case of demise where the first day has been excluded, see cases *supra*; and is an injury to lessee, as it deprives him of one day.

<sup>3</sup> Thus, New Hampshire: *Blake v. Crowninshield*, 9 N. H. 304; Indiana: *Jacobs v. Graham*, 1 Blackf. 392; Illinois: *Ewing v. Bailey*, 4 Scam. 420; Pennsylvania: *Thomas v. Afflick*, 16 Pa. St. 14; Kentucky: *Batman v. Megowan*, 1 Met. Ky. 533; Oregon: *Huffman v. Daniel*, 1 Oreg. 250.

<sup>4</sup> Connecticut: *Sands v. Lyon*, 18 Conn. 18; *Weeks v. Hull*, 19 *id.* 876; New York: *People v. N. Y. C. R. R.*, 28 Barb. 284; Nevada: *Hunter v. Sav. C. S. Min. Co.*, 4 Nev. 153; Massachusetts: *Bemis v. Leonard*, *supra*, where all the cases are elaborately reviewed, and the dictum in *Atkins v. Sleeper*, *supra*, overruled; United States: *Sheets v. Selden*, *supra*, overruling *Arnold v. U. S.*, 9 Cranch, 104; *Pearpoint v. Graham*, 4 Wash. C. C. 282. In England the law seems established in accord with the text by *Lester v. Garland*, 15 Ves. 248; *Webb v. Fairmaner*, 3 M. & W. 473; *Regina v. Middlesex*, 7 D. & L. 107; and the



erally, where the words of computation distinctly refer to the end of the period in question, the day will be included or excluded according to the rules just laid down.<sup>1</sup>

§ 80. **Void Parol Lease may regulate Duration of Tenancy.** — Although a lease by parol may be void, as exceeding the period allowed by the Statute of Frauds, or the tenancy may, according to circumstances, be construed at will, or from year to year, it will nevertheless be governed, in respect to its termination as well as to its other incidents, by the terms of the demise,<sup>2</sup> and will expire at the time limited by those terms without notice to quit.<sup>3</sup> It may also be determined under a proviso for re-entry, to be implied from that or the original lease.<sup>4</sup>

§ 81. **Optional Duration refers to Tenant's Option.** — If the duration of a tenancy is left optional by the terms of the lease, without saying at whose option, — as, for instance, if a lease be made for seven, fourteen, or twenty-one years, — it means at the option of the tenant, who has the right of choosing whether he will put an end to the lease at the end of seven years, or continue it for fourteen or twenty-one years.<sup>5</sup> And

early cases of *Rex v. Adderly*, Doug. 468; *Castle v. Burditt*, 3 T. R. 623; and *Glassington v. Rawlins*, 3 East, 407, depended each on its special circumstances, and established no general rule.

<sup>1</sup> *Small v. Edrick*, 5 Wend. 137; *Wiggin v. Peters*, 1 Met. 127.

<sup>2</sup> *Evans v. Winona Land Co.*, 30 Minn. 515; *Nash v. Berkmeier*, 88 Ind. 536; *Coan v. Mole*, 39 Mich. 454; *Hammond v. Dean*, 8 Baxt. 193.

<sup>3</sup> *Berry v. Lindley*, 3 M. & G. 514; *Doe v. Moffatt*, 15 Q. B. 257; *Doe v. Stratton*, 4 Bing. 446; *Tress v. Savage*, 4 Ellis & B. 36; *Creech v. Crockett*, 5 Cush. 133; *Elliott v. Stone*, 1 Gray, 574; *Martin v. Smith*, L. R. 9 Exch. 50.

<sup>4</sup> *Thomas v. Packer*, 1 H. & N. 669; *Hayne v. Cumming*, 16 C. B. N. S. 421.

<sup>5</sup> *Dann v. Spurrier*, 3 B. & P. 399; *Goodright v. Richardson*, 3 T. R. 462; *Doe v. Dixon*, 9 East, 15; *Goodright v. Mark*, 4 Maule & S. 30; *Fallon v. Robins*, 16 Ir. Eq. 422; *McMill v. Sheriff*, 8 Brewst. 537; *Nindle v. State Bank*, 13 Neb. 245; and where a demise was for six months, with a proviso that rent for the next six months should be in advance, this latter period was held to be at the tenant's option: *Commonwealth v. McNeile*, 8 Phila. 438; but where determinable "if both



in all cases of uncertainty, the tenant is most favored by law, because the landlord, having the power of providing expressly in his own favor, has neglected to do so; and also upon the general principle, that every man's grant is to be taken most strongly against himself.<sup>1</sup>

§ 82. **Tenancy from Year to Year determinable by Notice.** — It was formerly held that the effect of a lease "from year to year so long as both parties please," was, to create a tenancy for at least two years;<sup>2</sup> but this case was recently overruled in the Court of Queen's Bench, by a decision that a tenancy from year to year lasts only so long as both parties please, and that it is determinable by either party, at the end of the first or any other year, by giving the usual notice to quit at the end of that year; unless, in the creation of such a tenancy, the parties should introduce provisions showing that they contemplated a tenancy for at least two years.<sup>3</sup> But where the words were, "for one year from the date hereof, and so on from year to year, until the tenancy hereby created shall be determined, as after mentioned," with a subsequent proviso that it should be lawful for either party to determine the tenancy by giving three months' notice to the other; it was held that the tenancy was not determinable by a notice expiring before the end of the second year; for the court considered that the language of the contract clearly contemplated

parties think fit," both must concur : *Fowell v. Tranter*, 3 H. & C. 458 ; so *Brown v. Trumper*, 26 Beav. 11. When this option is exercised, see *post*, § 332, n.

<sup>1</sup> *Doe v. Dixon*, 9 East, 15 ; *Folts v. Huntley*, 7 Wend. 214 ; *Sweetser v. McKenney*, 65 Me. 225. A letting to a yearly tenant — and if he should wish a lease, that the lessor will grant the same for seven, fourteen, or twenty-one years, at the same rent — is sufficiently certain to be specifically performed. It is to be construed an optional lease for twenty-one years, determinable at the end of seven or fourteen years, at the option of the tenant. But, under such a contract, the landlord may call upon the tenant to exercise his option, and, in default, may determine the tenancy. *Hersey v. Giblett*, 18 Beav. 174.

<sup>2</sup> *Agard v. King*, Cro. El. 775 ; *Birch v. Wright*, 1 T. R. 380.

<sup>3</sup> *Doe v. Smaridge*, 7 Q. B. 957 ; *Fox v. Nathans*, 32 Conn. 848 ; *Doe v. Mainby*, 10 Q. B. 473.

a term to continue longer than one year.<sup>1</sup> Where a lease is made determinable before its regular expiration, at the option of the lessee, by giving six months' notice, it is advisable for the lessor to make that option conditional upon payment of rent due to the period of determination, and the performance of the lessee's covenants; for this being a condition precedent, the tenant will thereby be prevented from putting an end to the lease, leaving the charges upon the property unpaid, and the premises in a dilapidated state.<sup>2</sup>

§ 83. **Lease to exceed Lessor's Term void in Law but valid in Equity.**— In general, a deed which will not convey all that was intended will be upheld as a transfer of all that it was in the power of the grantor to convey;<sup>3</sup> and our law may be considered as having extended the English rule of law on this subject, which held that if a man has power to lease for ten years, and leases for twenty, the lease is bad at law, but good in equity for the ten years, operating as an execution of a power.<sup>4</sup> Upon this principle, a devise of lands to an executor, for the payment of the debts of the testator, or until his debts are paid, or a particular sum is raised from the profits of the estate, was held to create an estate for so many years only as should be found necessary to raise the required sum.<sup>5</sup> No man may grant a lease to continue beyond the period at which his own estate is to determine; but trustees who have a fee, though determinable, may grant a lease valid at law, though

<sup>1</sup> *Doe v. Green*, 9 Ad. & E. 658; *Regina v. Chawton*, 1 Q. B. 247. So *Wharton v. Kelly*, 14 Ir. C. L. 293, where the premises were let "for one year certain," and rent quarterly in "each and every year during the tenancy," with certain allowances "during the first four quarters." A lease for one year, and so for two or three years, as the parties shall agree, means for two years; and after every subsequent year begins, is not determinable till that is ended. *Harris v. Evans*, 1 Wils. 262; s. c. in equity, Amb. 329. But it is a lease for one year only, without such subsequent agreement. *Ib.*

<sup>2</sup> *Porter v. Shephard*, 6 T. R. 665.

<sup>3</sup> *Law v. Hempstead*, 10 Conn. 23; *Martin v. Sterling*, 1 Root, 210.

<sup>4</sup> *Roe v. Prideaux*, 10 East, 158; *Taylor v. Horde*, 1 Burr. 120.

<sup>5</sup> *Corbet's Case*, 4 Co. 81, b; *Carter v. Barnardison*, 1 P. Wms. 509-518.

it is to continue after their estate is determined. But equity can annul such a lease if unreasonable or improvident.<sup>1</sup> A lease also under a power takes effect out of the estate of the donor of the power, and is not limited to the life of the donee.<sup>2</sup>

<sup>1</sup> *Greason v. Keteltas*, 17 N. Y. 491.

<sup>2</sup> *Sugd. Pow.* Ch. 7, Sect. 8, § 11. By statute, as in New York, a power may be given to a tenant for life to make leases for not over twenty-one years, to commence during life.

## CHAPTER IV.

## THE CONTRACTING PARTIES.

§ 84. **Who may grant Leases.**—All persons seised or possessed of lands or tenements may grant leases thereof for any period commensurate with their respective interests; except such only as are under some legal disability, and whom the law supposes to be incapable of entering into a contract.<sup>1</sup> At common law, as well as by statute, there is the further qualification to be observed, that every grant of land is void, if, at the time of its delivery, the land shall be in the actual possession of a person claiming under a title adverse to that of the grantor. If, however, the lessor is in possession at the time of making a lease, he will be deemed to have the right of possession, as to all persons holding under him; but without such possession, he cannot make a valid lease; for a bare right of entry is but a *chose in action*, and is not assignable.<sup>2</sup> If he has actual possession, though it may have been obtained

<sup>1</sup> Thus by N. Y. R. S. 719, §§ 8, 10; *ib.* 739, § 147, citizens of the United States, except persons *non compos* or infants, may take, hold, and alien lands. Any one having a right of entry on land may convey. *Price v. Pierce*, 36 Me. 148.

<sup>2</sup> *Iseham v. Morrice*, Cro. Car. 109. To constitute an adverse possession, it must be under a claim of some specific title. *Crary v. Goodman*, 22 N. Y. 170. And where an occupant of land produces no written title, but relies solely on possession, with an assertion of title, he can retain only so much as he had under actual improvement, and within a substantial enclosure. *Jackson v. Warford*, 7 Wend. 62; *Monro v. Merchant*, 26 Barb. 383, 404; *Sherry v. Frecking*, 4 Duer, 452. By the Statute of Frauds, a parol gift of land in fee creates only a tenancy at will; and, if the donee makes a lease, it is void, and cannot be rendered valid by any subsequent assent of the donor. *Jackson v. Rogers*, 1 Johns. Cas. 33; *Doe v. Watts*, 7 T. R. 85; *Jenkins v. Church*, Cowp. 482; *Doe v. Butcher*, Doug. 50.

tortiously, — a mere disseisor, in fact — it will enable him to make a lease, which can only be avoided upon eviction, by one having a paramount title.<sup>1</sup>

§ 85. **Lessor's Possession essential.** — Rule modified as to **Meane Lessee, Heir, and Vendee.** — Possession is of so much importance to the validity of a lease that if a disseisee wishes to make a lease of land of which he is disseised, he can only deliver it as an escrow, to take effect after he recovers possession. His deed will not operate before entry, further than to transfer the lessor's right of entry, to take effect after his entry.<sup>2</sup> But this rule applies only to the original parties, for a lessee for years, having an *interesse termini*, may make a good lease of part, or an assignment of the whole of his term, before he enters on the demised premises.<sup>3</sup> And if a man dies, and his heir, before entry, makes a lease of the land which descended to him, this is a good lease, for he is seised in law, though not in fact. But if a stranger had entered, and abated into the land, and then the heir had made the lease, it would have been bad, for it would have been made after a disseisin.<sup>4</sup> The possession of a tenant for life, however, is not adverse to that of the remainder-man, and hence

<sup>1</sup> Bac. Abr. Leases (I.), 4 ; Lee v. Norris, Cro. El. 331 ; Thurston's Case, Owen, 16 ; Mayowe's Case, 1 Co. 147 (a). Possession is the detention or enjoyment of a thing which a man holds or exercises by himself or by another who keeps or exercises it in his name, and the enjoyment is necessarily exclusive. Redfield v. Utica & S. R. R., 25 Barb. 54. A disseisin is an estate gained by wrong and injury ; and therein differs from a dispossession, which may be right or wrong. A mere entry upon another is not a disseisin unless it is accompanied with expulsion from the freehold ; and a peaceable entry upon land apparently vacant furnishes, *per se*, no presumption of wrong. Smith v. Burtis, 6 Johns. 197 ; Varick v. Jackson, 2 Wend. 166 ; Co. Lit. 3, b ; 18, b.

<sup>2</sup> Doe v. Watts, 9 East, 19 ; Jennings v. Bragg, Cro. El. 447 ; Sharp v. Sharp, *ib.* 483 ; Co. Lit. 48, b. The rule that avoids every conveyance of land which is held adversely at the time of the conveyance, does not apply to a lease made by the State ; for there can be no adverse possession as against the people. The people cannot be disseised. People v. Mayor, 28 Barb. 240.

<sup>3</sup> Plowden, 133-142 ; Co. Lit. 46, b ; Cro. Jac. 60.

<sup>4</sup> Shep. Touch. 269. See 2 R. S. of N. Y. 294, § 11 ; Code of Pro. § 84.

the latter may make a valid lease, notwithstanding such possession.<sup>1</sup> A defaulting vendee may also make a lease of the land purchased, and receive rent therefor, which will continue valid until that sale is rescinded; but such a lease will give the tenant no right of possession, after he has received notice of a rescission of the contract of sale.<sup>2</sup>

§ 86. *Owner's Possession presumed.* — *Undisputed right of, sufficient.* — But possession will always be considered as following the ownership, unless there is an adverse possession. And, where there has once been an actual seisin, it will be presumed to continue, although the premises may appear to be vacant.<sup>3</sup> At common law no interest in land could pass from a vendor, before he had himself obtained possession, by livery of seisin; but by force of the Statute of Uses, the possession was transferred in all cases to the use of the *cestui que use*, who may now, if there is no adverse possession, make a lease for years, without actual entry.<sup>4</sup> It is enough that a

<sup>1</sup> *Grout v. Townsend*, 2 Hill, 554; *Doe v. Brown*, 2 Ellis & B. 331. The possession of a tenant in common law, however long continued, is not, if unaccompanied with a claim of entire title, adverse to the co-tenants. *Smith v. Burtis*, 9 Johns. 174; *Thompson v. Mayor*, 11 N. Y. 115. But it is otherwise if he actually excludes his co-tenant. *Northrop v. Wright*, 24 Wend. 221; *Humbert v. Trinity Ch.*, *ib.* 587; *Butler v. Phelps*, 17 *id.* 642; *Sherry v. Frecking*, 4 Duer, 452.

<sup>2</sup> *Jones v. Hutchinson*, 2 Tex. 370.

<sup>3</sup> *Fosgate v. Herkimer Manuf. Co.*, 9 Barb. 287; s. c. 12 *id.* 352. But where a grantor, after conveyance, remains in possession, it is not as owner, but as tenant to the grantee, and nothing but a clear, unequivocal, and notorious disclaimer of the latter's title can render the possession adverse. *Jackson v. Burton*, 1 Wend. 341; *Swart v. Service*, 21 *id.* 36. And see *Butler v. Phelps*, 17 Wend. 642.

<sup>4</sup> *Bellingham v. Alsop*, Cro. Jac. 52; *Dymmock's Case*, *ib.* 408; *Harvy v. Thomas*, Cro. El. 216. To constitute an adverse possession, the entry of the disseisor must have been at the time under claim or color of title. *Humbert v. Trinity Ch.*, 24 Wend. 587; *Hoyt v. Dillon*, 19 Barb. 644. Otherwise it is a mere trespass. *Miller v. Platt*, 5 Duer, 272. It must be such as to raise the presumption of a deed, and the intention will guide the entry and fix its character. It must be continued, uninterrupted, notorious, and exclusive; and the burden of proof is on the party alleging it to be so. 1 Hill. Real Prop. 47. It must be of such a nature as to indicate that the possession is claimed as a right, and is not the result

lessor has a clear right of possession at the time of making his lease; and if at such time he has an undisputed reversion his lease will be a good charge upon the reversion, and take effect in interest, and in possession also if the reversion happens to be reduced into possession during the period limited by the contract for the enjoyment of the land, — the lessor being estopped, by his own deed, from saying that he did not demise the premises.<sup>1</sup>

§ 87. **Present inoperative Leases operate by Estoppel.** — Although a lessor may have no title to the land which he undertakes to demise, or may be a disseisor, his lease will still operate by way of estoppel if he comes into possession, by purchase or descent, at any time before the expiration of the term.<sup>2</sup> But as estoppels are not generally favored, and

of indulgence, or of some compact short of a grant. *Gayetty v. Bethune*, 14 Mass. 53; *Arnold v. Stevens*, 24 Pick. 110. Under the New York statute, 1 R. S. 739, § 147, every grant of land is void, if, at the time of delivery, the land is in actual possession of a person claiming under a title adverse to that of the grantor. And the claim may be oral, if made by an actual occupant. *Humbert v. Trinity Ch.*, *supra*. But if the entry is under color of title, the possession is adverse, however groundless the supposed title may be. The fact of possession and its character, the *quo animo* of the possessor, are the tests. *La Frombois v. Jackson*, 8 Cow. 589; *Livingston v. Peru Iron Co.*, 9 Wend. 511. The possession of a mere intruder, making no claim, is insufficient; but if such a one obtains a deed from one who enters claiming title, his possession under that deed is adverse from that time. *Jackson v. Smith*, 13 Johns. 406; *Jackson v. Frost*, 5 Cow. 346. Nor will the mere expectation of a grant suffice. *Howard v. Howard*, 17 Barb. 663; *Luce v. Carley*, 24 Wend. 451. But it is no objection that the grant was fraudulently obtained: *Bogardus v. Trinity Ch.*, 4 Sandf. Ch. 633; or was without any foundation as matter of right or unauthorized: *Jackson v. Elston*, 12 Johns. 452; and see *Bradstreet v. Clarke*, 12 Wend. 602, 674; *Bryan v. Atwater*, 5 Day, 181; *Clapp v. Bromagham*, 9 Cow. 530.

<sup>1</sup> *Russell v. Doty*, 4 Cow. 576; *Kinsman v. Greene*, 16 Me. 60; *Milford v. Fenwick*, And. 288; s. c. *Moor*, 284; *Bould v. Winston*, Cro. Jac. 168; *Sutton's Case*, Cro. El. 140. It has been held in Pennsylvania that a purchaser at a sheriff's sale who has not received his deed cannot make a valid lease. *Hall v. Benner*, 1 Penn. 402.

<sup>2</sup> *Jackson v. Murray*, 12 Johns. 201; *Sinclair v. Jackson*, 8 Cow. 543; *Jackson v. Stevens*, 16 Johns. 110; *Cocke v. Brogan*, 5 Pike, 693; *Jackson v. Bradford*, 4 Wend. 619; *Austin v. Ahearne*, 61 N. Y. 6; Co. Lit.

will not be permitted to defeat an estate if it can be avoided, there will be no estoppel if some interest actually passed by the lease, though the interest purported to have been granted is really greater than the lessor had, at the time, power to grant. Thus, if a lessee for the life of B. makes a lease for years, and then purchases the reversion in fee, after which the *cestui qui vie* dies, the lessor may avoid this lease, though several of the years therein expressed are still to come; for he may confess and avoid the lease, which took effect in point of interest, and determined on the death of B.<sup>1</sup> So if two join in a lease, and one only has any interest in the premises, it will enure by way of confirmation from the other, and not by way of estoppel.<sup>2</sup>

§ 88. **Successive Leases.** — **Estoppel applied to.** — Where a lease for years cannot take effect immediately, by reason of a prior lease of the same premises, the second lease will operate presently by estoppel, for so much of the term as may be left after the determination of the former lease, by way of passing an interest.<sup>3</sup> A grantor by deed is always estopped from saying he had no interest, unless he is a trustee for the public, deriving his authority from an act of the legislature;<sup>4</sup> but if it appears, from recitals in the lease, that he had no interest

47, 227; *Hermitage v. Tomkins*, 1 Ld. Ray. 729; *Webb v. Austin*, 7 M. & G. 701; *Whitton v. Peacock*, 2 Bing. (N. C.) 411. If a man conveys land which is not his, and he afterwards purchases the land, he is, notwithstanding, bound by his deed, and will not be permitted to aver he had nothing, and the stranger to whom he sells will be equally estopped. Co. Lit. 45. a; 47, b; 352, a, b; *Rawlyn's Case*, 4 Co. 53, a; *Iseham v. Morrice*, Cro. Car. 110; *Luxton v. Stephens*, 3 P. Wms. 373; *Jackson v. Bull*, 1 Johns. Cas. 81; *Somes v. Skinner*, 3 Pick. 52.

<sup>1</sup> *Leicester v. Rehoboth*, 4 Mass. 180; *id.* 273; *Jackson v. Hoffman*, 9 Cow. 271; Co. Lit. 47, b; *Anon. Ventr.* 358; *Brown v. McCormack*, 6 Watts, 60; *Bush v. Cooper*, 18 How. 82. But the estoppel operates as against a lessor owning the equitable title to the leased premises at the time of the lease, and afterwards acquiring the legal title. *Skidmore v. Railway Co.*, 112 U. S. 33, in which case the rule was applied against a judgment creditor of the lessor whose judgment was subsequent to the lease.

<sup>2</sup> *Brereton v. Evans*, Cro. El. 700.

<sup>3</sup> *Gilman v. Hoare*, 1 Salk. 275.

<sup>4</sup> *Fairtitle v. Gilbert*, 2 T. R. 169.



at the time of the demise, and he afterwards purchases the land, it will not enure to the lessee by estoppel.<sup>1</sup> He is, however, always estopped from contending that he had merely an equitable, and not a legal, estate when he granted the lease.<sup>2</sup>

§ 89. **Tenant's Estoppel.** — The estoppel of a tenant to deny his landlord's title, though belonging to a different topic than the creation of a demise, and fully discussed hereafter in connection with the landlord's remedies,<sup>3</sup> may be noticed properly here in view of considerations equally applicable to both kinds of estoppel. This estoppel was unknown to the common law,<sup>4</sup> and is an estoppel *in pais*.<sup>5</sup> It had its origin in the early part of the last century, and probably from the features of the action of *assumpsit* for use and occupation.<sup>6</sup> The only tenant's estoppel known when Lord Coke wrote was that strictly by indenture, and the peculiarities of this instrument gave rise to most of the rules then in force.<sup>7</sup> Thus it was a principle that an estoppel would not bar a lessee beyond the duration of the interest which he derived under the lease. Therefore, if a man took a lease for years, by deed indented of his own land, it was no conclusion beyond the term, at the end of which the lessor might enter and occupy the land; for, by the determination of the term, the estoppel was also determined.<sup>8</sup> But the tenant's estoppel is now no longer thus restricted, as it is founded on possession and not on the instrument of demise,<sup>9</sup> and is as operative after the conclusion

<sup>1</sup> *Hermitage v. Tomkins*, 1 Ld. Ray. 729.

<sup>2</sup> *Green v. James*, 6 M. & W. 656.

<sup>3</sup> *Post*, §§ 705–707.

<sup>4</sup> Bigelow, *Estoppel*, 346, 348, 349 (2d ed.); 6 Am. Law Rev. 1 *et seq.*; *Delaney v. Fox*, 2 C. B. N. S. 768.

<sup>5</sup> The only estoppels *in pais*, in Lord Coke's day, were entry, livery, partition, and acceptance of rent or an estate. Of these all but the last are obsolete. Bigelow, *Estoppel*, 346 (2d ed.).

<sup>6</sup> Bigelow, *Estoppel*, 350 (2d ed.); 6 Am. Law Rev. 4.

<sup>7</sup> *Ib.*; *Moffatt v. Strong*, 9 Bosw. 57, 65.

<sup>8</sup> *Rawlyn's Case*, 4 Co. 54, a; *James v. Landon*, Cro. El. 86. And see *Page v. Kinsman*, 48 N. H. 328.

<sup>9</sup> 6 Am. Law Rev. 19; Bigelow, *Estoppel*, 350 (2d ed.).

of the lease as before, and until that possession ceases.<sup>1</sup> It is only where there is fraud or mistake, in consequence of which one takes a lease of his own land, that he will not be estopped to show this on the termination of the lease.<sup>2</sup>

§ 90. **Mutual Estoppel.** — Again, it was a rule that all estoppels should be reciprocal and mutual;<sup>3</sup> but this was not only derived from, but limited to, those by indenture or by record.<sup>4</sup> A deed poll, or even an indenture, if not executed by both parties, could not create an estoppel.<sup>5</sup> But this rule is no longer unqualified, and a lessor by estoppel is bound by his demise, though the tenant may elect whether or not to take the term when it accrues; and, on the other hand, a tenant is concluded from denying the landlord's title, though the counter obligations upon the landlord to deliver and permit peaceable possession rest in contract only, and are in no sense estoppels. Thus, even when the lessor is under a disability, such as infancy, or, formerly, coverture, and the lease is voidable, the lessee is estopped until it is avoided.<sup>6</sup>

§ 91. **Estoppels run with the Land.** — But an estoppel is not confined wholly to the parties to the lease; being annexed to the estate, it runs with the land, and is binding on all persons claiming under them. The heir of the reversioner being privy in blood, and taking the estate subject to the burdens imposed on his ancestor, is bound wherever that ancestor, leaving no estate in the premises, or only a contingent remainder, makes a lease by indenture, and afterwards purchases the fee of the land demised, and dies.<sup>7</sup> The heir, however, will not be

<sup>1</sup> *Post*, § 705; *Binney v. Chapman*, 5 Pick. 124; *Doe v. Skirrow*, 7 Ad. & E. 157.

<sup>2</sup> *Post*, § 707, notes, and cases cited.

<sup>3</sup> Co. Lit. § 352.

<sup>4</sup> Co. Lit. 363, b; *Pike v. Eyre*, 9 B. & C. 909; *Wright v. Douglas*, 10 Barb. 97.

<sup>5</sup> *Hill v. Saunders*, 2 Bing. 112; *Cardwell v. Lucas*, 2 M. & W. 111; *Wilson v. Woolfryes*, 6 M. & S. 341.

<sup>6</sup> *Russell v. Irwin*, 38 Ala. 44; *Gran v. White*, 42 Mo. 285; *Welland Canal v. Hathaway*, 8 Wend. 480; *Prevost v. Lawrence*, 51 N. Y. 219.

<sup>7</sup> *Webb v. Austin*, 7 M. & G. 701; *Weale v. Lower*, Pollexf. 54; Co. Lit. 352, a.

bound, unless he claims the land from him who created the estoppel; for, if he purchases the reversion, or if it devolves upon him by descent from another ancestor, he will not be bound.<sup>1</sup> Nor will he be bound in such a case unless the estoppel would have operated upon the inheritance in the hands of his ancestor; and, therefore, if tenant for life makes a lease for years, and afterwards purchases the reversion and dies within the term, his heir may enter; for a freehold being a greater estate than any term of years, the decease of the tenant for life, out of whose estate the lessee's interest arose, is the regular period appointed by law for the determination of the lease.<sup>2</sup> Privies in estate are also bound, when a man makes a lease, by indenture, of property to which he has no title, and afterwards, becoming its owner in fee, disposes of it to another; for the purchaser will be estopped from disputing the lease.<sup>3</sup>

92. **Rule of Assignee's Estoppel obsolete.** — It was formerly thought that the assignees respectively of the lessor or lessee by estoppel could not maintain an action on the covenants of the lease against the other party thereto.<sup>4</sup> This rule, which was limited to the technical action of covenant<sup>5</sup> and to estoppel by deed,<sup>6</sup> turned strictly on the requirements of special pleading, and was never operative where this system was not in force; but the estoppel arose without being pleaded.<sup>7</sup> It seems, moreover, now clearly overruled even in England.<sup>8</sup>

<sup>1</sup> *Edwards v. Rogers*, W. Jo. 460; *Goodtitle v. Morse*, 3 T. R. 371.

<sup>2</sup> *Treport's Case*, 6 Co. 15, a; Co. Lit. 47, b; *Blake v. Foster*, 8 T. R. 487; *Carvick v. Blagrove*, 1 Br. & B. 531.

<sup>3</sup> *Trevivan v. Lawrence*, Holt, 282; *Webb v. Austin*, *supra*; *Sturgeon v. Wingfield*, 15 M. & W. 324.

<sup>4</sup> *Noke v. Awder*, Cro. El. 436; *Whitton v. Peacock*, 2 Bing. (N. C.) 411; *Carvick v. Blagrove*, 1 Br. & B. 531.

<sup>5</sup> *Rennie v. Robinson*, 1 Bing. 147; *Dunshee v. Grundy*, 15 Gray, 314.

<sup>6</sup> *Kieran v. Sandars*, 6 Ad. & E. 515; *Veale v. Warner*, 1 Wms. Saund. 323, 328, n. (d).

<sup>7</sup> *Ib.*; *Patten v. Deshon*, 1 Gray, 325, 326.

<sup>8</sup> *Gouldsworth v. Knights*, 11 M. & W. 344; *Cuthbertson v. Irving*, 4 H. & N. 342; 6 *id.* 135; 1 Smith, L. C. 38 a-38 g.

## SECTION I.

## LEASES BY AND TO INFANTS.

§ 93. **Voidable, and when.** — A minor cannot make a lease that will bind him when he arrives at full age;<sup>1</sup> the rule being now well settled in this country, as well as in England, that all contracts except for necessities made by a minor, including his deeds and other instruments under seal, are voidable; that is, he may disavow and so annul them, either at or before his majority, or within a reasonable time after it.<sup>2</sup> But if he makes a lease rendering rent, it passes an interest in the estate to the lessee, and binds the adult party, until the minor chooses to avoid it.<sup>3</sup> If, however, the lease is by deed, he cannot avoid it, until he comes of age; although he may always enter and take the profits, until the time arrives when he has legal capacity to affirm or disaffirm the deed, and the instrument of lease will not be rendered void by such an entry, for he may still affirm it at full age.<sup>4</sup> But when the lease is by parol, if he ratifies it on coming of age, as by receiving

<sup>1</sup> *Roof v. Stafford*, 7 Cow. 179; *Johnson v. Packer*, 1 Nott & McC. 1; *Roberts v. Wiggin*, 1 N. H. 74; *Jackson v. Carpenter*, 11 Johns. 539. A rent-charge granted by an infant is voidable only. *Hudson v. Jones*, 3 Mod. 310.

<sup>2</sup> *Bool v. Mix*, 17 Wend. 119; *Eagle Fire Co. v. Lent*, 6 Paige, 635; per Story, J., in *Tucker v. Moreland*, 10 Pet. 71; *Wheaton v. East*, 5 Yerg. 41; *Worcester v. Eaton*, 13 Mass. 371; *Roberts v. Wiggin*, *supra*; *Phillips v. Green*, 5 T. B. Mon. 344; *Farr v. Sumner*, 12 Vt. 28. The rule seems to be universal that all deeds or instruments under seal, executed by an infant, are voidable only, with the single exception of those which delegate a naked authority, which are void. Per Bronson, J., in *Bool v. Mix*, *supra*.

<sup>3</sup> *Zouch v. Parsons*, 3 Burr. 1794; *Walmsley v. Lindenberger*, 2 Rand. 478; *U. S. v. Bainbridge*, 1 Mason, 82; *Goodsell v. Myers*, 3 Wend. 479; *Brown v. Caldwell*, 10 S. & R. 114.

<sup>4</sup> *Roof v. Stafford*, 7 Cow. 179; 9 *id.* 626; Bac. Abr., tit. Infancy; *Bool v. Mix*, *supra*. An infant cannot avoid his lease by deed during minority. *Slator v. Trimble*, 14 Ir. C. L. 842; *Robson v. Flight*, 4 De G., J. & S. 608.

rent which accrued after that period, or the like, he confirms the lease and cannot afterwards impeach it.<sup>1</sup>

§ 94. *Ratification implied.* — Very slight acts and circumstances are sufficient to show an infant's assent to a contract after his majority.<sup>2</sup> In fact, our authorities seem to authorize the statement of the rule to be, that no distinct act of confirmation is necessary, but that all the voidable contracts of an infant are binding upon him, unless there be an express disaffirmance on his part, when he comes of age.<sup>3</sup> And as to a lease, it is held that some act of notoriety, such as the bringing of an action of ejectment, or the making of a formal entry or demand of possession, is required for such a purpose.<sup>4</sup> The mere execution, after he attains his age, of another lease or conveyance of the same property, even to a purchaser for value, is no disaffirmance of an infant's deed.<sup>5</sup> And to render a subsequent

<sup>1</sup> *Smith v. Low*, 1 Atk. 489; *Brown v. Caldwell*, 10 S. & R. 114; Co. Lit. 308, a; 1 Rol. 780; *Smith v. Bowin*, 1 Mod. 25; *Warwick v. Bruce*, 2 M. & S. 205; 4 Leon. 4.

<sup>2</sup> *Houser v. Reynolds*, 1 Hayw. 143; *Den v. Stowe*, 2 Dev. & B. 320. But in *Slater v. Trimble*, 14 Ir. C. L. 342, acceptance of rent was held an affirmance of a lease during minority, though infant had commenced an ejectment before majority, and had demised the land to another. In England, by statute 9 Geo. IV. c. 14, § 5, it is necessary that the ratification be in writing, signed by the party to be charged thereby; but any writing is sufficient, which, in an adult, would be considered an adoption or ratification of an act done by one acting as an agent. *Harris v. Wall*, 1 Exch. 122; *Hartley v. Wharton*, 11 Ad. & E. 934. A similar statute exists in Maine.

<sup>3</sup> *Zouch v. Parsons*, *supra*; *Holmes v. Blogg*, 8 Taunt. 85; *Jackson v. Burchin*, 14 Johns. 124; *Curtin v. Patton*, 11 S. & R. 305; *Cheshire v. Barrett*, 4 McCord, 241; *Richardson v. Boright*, 9 Vt. 368. The rule was stated in a Connecticut case to be that there are three ways of affirming the voidable contracts of an infant when he arrives at full age: 1. By an express ratification; 2. By acts which reasonably imply an affirmance; 3. By his omission to disaffirm within a reasonable time. *Kline v. Bebee*, 6 Conn. 494; *Worcester v. Eaton*, 13 Mass. 371.

<sup>4</sup> *Slater v. Brady*, 14 Ir. C. L. 61.

<sup>5</sup> *Bool v. Mix*, *supra*; *Dominick v. Michael*, 4 Sandf. 874; *Slater v. Brady*, *supra*. In order to avoid the deed of an infant, after he comes of age, he must, before suit brought, make an entry on the land, and execute a deed to a third person, or do some other act of equal notoriety, in dis-

conveyance, after he arrives of age, an act of dissent to the prior deed, it must be so inconsistent therewith, that both deeds cannot stand together.<sup>1</sup>

§ 95. **Who may avoid. — Burden to prove Infancy. —** None but the infant himself, or his personal representatives, can avoid a lease on the ground of infancy. Being a personal privilege, intended for his special benefit, he is, while living, the exclusive judge of the propriety of exercising it; and when dead, those alone should interfere who legally and personally represent him.<sup>2</sup> For this reason, mere privies in estate, such as assignees or guardians, cannot avoid an infant's lease.<sup>3</sup> And so little encouragement do the courts afford to a defence of this description, that, when a plea of infancy is interposed, the burden of proof rests entirely on the infant, even though the issue be upon a ratification of his contract after he came of age.<sup>4</sup>

§ 96. **Infant lessee's Ratification implied from Possession. —** An infant lessee may also avoid a lease, although it is always available for the purpose of vesting the estate in him so long as he thinks proper to hold it. If, upon his arrival at full

affirmance of the deed. *Voorhies v. Voorhies*, 24 Barb. 150. Mortgaging the property to a tenant, referring to the lease, is a confirmation. *Story v. Johnson*, 3 Y. & C. 586.

<sup>1</sup> *The Eagle Fire Co. v. Lent*, 6 Paige, 635. Mere acquiescence in a conveyance, after majority, without any intermediate benefit, such as the possession of the premises or the collection of rent, is no affirmance of the conveyance. *Jackson v. Carpenter*, 11 Johns. 539. And no bare recognition, or silent acquiescence, for any time less than the period of statutory limitation, will amount to a ratification of a deed. *Voorhies v. Voorhies*, *supra*; *Jackson v. Burchin*, *supra*.

<sup>2</sup> *Jackson v. Todd*, 6 Johns. 257; *Roberts v. Wiggin*, 1 N. H. 73; *Hartness v. Thompson*, 5 Johns. 160. The lessee cannot set up the lessor's minority in order to defeat the lease or to obtain relief from its covenants. *Field v. Herrick*, 101 Ill. 110.

<sup>3</sup> *Hoyle v. Stowe*, 2 Dev. & B. 323. But see *Dominick v. Michael*, *supra*; *Whittingham's Case*, 8 Co. 42, b; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 286; *Oliver v. Houdlet*, 13 Mass. 237; *Irvine v. Crocket*, 4 Bibb, 437.

<sup>4</sup> 2 Greenleaf, Ev. § 362; *Jeune v. Ward*, 2 Stark. 326.

age, he continues in possession of land demised to him during his minority, he will be deemed to have waived his right to avoid it, unless he elects to do so within a reasonable time thereafter.<sup>1</sup> It belongs to a jury to determine what is a reasonable time, under the circumstances of each particular case; but it seems that an acquiescence for four months after his majority would preclude an infant from afterwards disaffirming a lease.<sup>2</sup> As to his liability for rent, or the performance of other stipulations contained in the lease, he is in the same situation, with respect thereto, as in case of any other contract; for he may disaffirm it when he comes of age, or at any time previously thereto, and thus avoid his obligation. So long, however, as he remains in possession, his liability to pay rent and perform covenants subsists by virtue of the privity of estate; and he can only escape payment by avoiding the lease before rent-day; for, as a general rule, an infant cannot retain possession of property, and at the same time repudiate his contract in relation thereto.<sup>3</sup> But where his liability rests wholly in contract, as it would do, after he had quit possession, he may plead his infancy as in other cases.<sup>4</sup> An infant, however, is always liable for necessities;<sup>5</sup> and, although this is a relative term, depending upon his situation in life, an obligation to pay for lodgings probably comes within this description. And, in a case

<sup>1</sup> Bac. Abr., tit. Infant, p. 611; *Kline v. Bebee*, 6 Conn. 494.

<sup>2</sup> *Doe v. Smith*, 2 T. R. 436; *Holmes v. Blogg*, *supra*.

<sup>3</sup> *Kitchen v. Lee*, 11 Paige, 107; *Henry v. Root*, 33 N. Y. 526. Where an estate vests in an infant by operation of law, and he has not disclaimed, he becomes liable for rent, notwithstanding his infancy. *Kelly v. Coote*, 5 Ir. C. L. 469; *post*, § 628.

<sup>4</sup> *Kelsey's Case*, Cro. Jac. 320. In *N. W. R. R. v. M'Michael*, 5 Exch. 126, Parke, B., thus states an infant's liability: "His purchase vested the estate in him, on entry and taking possession, and rendered him liable to the obligations attached to it until he disagreed to the estate and thereby caused the conveyance to be inoperative, and so avoided the obligation to pay rent. As the estate vests, the burthen upon it must continue to be obligatory until a waiver or disagreement by the infant takes place." And *per Gibbs*, C. J., in *Holmes v. Blogg*, *supra*, an infant may avoid a lease, and thereby escape the burden of the covenants; but that is all he can do. And see *post*, § 628.

<sup>5</sup> *Smith v. Oliphant*, 2 Sandf. 306; *Randall v. Sweet*, 1 Den. 460.



where an infant rented a house, and exercised his trade as a barber therein, it was held to be properly left to the jury to decide, in an action to charge him with the rent of a house after he had quit possession, whether such a contract came within the meaning of the term "necessaries" so as to bar his plea of infancy.<sup>1</sup>

## SECTION II.

### BY PERSONS OF UNSOUND MIND.

§ 97. **General Incapacity of Insane Persons.** — Idiots and lunatics, being void of understanding, and consequently unable to give that deliberate assent which is necessary to the validity of a contract, are, on principles of humanity as well as of justice, restrained from making any contract.<sup>2</sup> But previous or subsequent lunacy will not vitiate a contract entered into during an interval of sanity.<sup>3</sup> Mr. Justice Story, in his Commentaries on Equity Jurisprudence, lays it down as a general principle, that the contract of any person who is *non compos mentis* — from age, imbecility, or other personal infirmity — is absolutely void.<sup>4</sup> But this rule does not seem to apply to a deed, for the deed of a person who is *non compos mentis* is only void if he be under guardianship; but if he is not under guardianship it is merely voidable, and only becomes void according to circumstances.<sup>5</sup> The guardian or committee of

<sup>1</sup> *Lowe v. Griffiths*, 1 Hodges, 30; s. c. 1 Scott, 415.

<sup>2</sup> *Faulder v. Silk*, 3 Camp. 126; *Seaver v. Phelps*, 11 Pick. 304; *Jackson v. King*, 4 Cow. 207; *Dane v. Kirkwall*, 8 C. & P. 679. An idiot is one who is a natural fool, or one *a nativitate*. A lunatic is one who has become *non compos mentis* by the visitation of God.

<sup>3</sup> *Jackson v. King*, *supra*; *Johnson v. Moore*, 1 Litt. 371; *Owen v. Davies*, 1 Ves. Sr. 82.

<sup>4</sup> 1 Story, Eq. § 222.

<sup>5</sup> *Wait v. Maxwell*, 5 Pick. 217; *Webster v. Woodford*, 3 Day, 90. The lunacy of a mortgagor does not absolutely avoid the mortgage; it is, at most, voidable at the election of the lunatic or his personal representatives, or those claiming some interest under him in the premises. A lunatic is not absolutely disqualified from making a contract; the law



a lunatic is generally authorized to execute leases of his property, under the direction of the court which appointed him to office; but, without the aid of a statutory provision conferring such authority upon the court, the committee of a lunatic would have no such power.<sup>1</sup>

§ 98. **Weakness alone does not incapacitate.** Mere weakness of mind is not, of itself, a sufficient ground for avoiding

will, in certain cases, even raise one by implication (*Wentworth v. Tubb*, 2 Y. & C. Ch. 537). There is a strong analogy between a lunatic and an infant in relation to their power to contract. Either can oblige himself for necessities, *Baxter v. Portsmouth*, 5 B. & C. 170; s. c. 2 C. & P. 178; 7 Dowl. & Ry. 614; *Howard v. Digby*, 2 C. & F. 634; *Leach v. Marsh*, 47 Maine, 548; and the law provides for each a formal process by which to avoid their agreements. *Per* Gardiner, J., in *Ingraham v. Baldwin*, 9 N. Y. 45. In those jurisdictions where a judicial finding of insanity or habitual drunkenness renders the subject civilly dead, all contracts made by an idiot, lunatic, or habitual drunkard, after the finding, are absolutely void. *L'Amoureux v. Crosby*, 2 Paige, 422; *White v. Palmer*, 4 Mass. 147; *Beverley's Case*, 4 Co. 126, b. But where an artificial incapacity is not created by the finding, or where no determination of the question of sanity has been had, the only "disability which will render the party incapable of contracting, is that which arises from a total loss of understanding, either in respect of all subjects, or of the particular act done: and it does not follow because . . . one might be a proper subject of a commission . . . that his acts will be either void or voidable in a court of law." Buswell, *Law of Insanity*, § 277, and cases cited.

<sup>1</sup> *Knipe v. Palmer*, 2 Wils. 130. After a commission to inquire into an alleged case of lunacy has issued, and before inquisition found, all persons deal with the suspected individual at their peril; and conveyances made by him after that event will be set aside if the person dealing with him knew that proceedings had been taken. *Griswold v. Miller*, 15 Barb. 520. The leading English cases of *Molton v. Camroux*, 2 Exch. 487; s. c. 4 Exch. 17; *Beavan v. McDonnell*, 9 *id.* 309, established the rule that a contract is not vitiated by the unsoundness of mind of one of the contracting parties if this fact is unknown to the other, and no advantage is taken of the lunatic; and the rule is now generally adopted in the United States. See Buswell, *Law of Insanity*, §§ 287, 292. But this rule applies to cases in which the contract is not merely executory, but has been executed in whole or in part so that the parties cannot be restored to their original position.

The committee of a lunatic becomes personally liable for rent if he takes possession and makes use of premises under a lease held by the lunatic. *Matter of Otis*, 84 Hun, 542.

a contract, unless some stratagem or fraud has been resorted to by the person in whose favor it was made ; for, if a man be legally *compos mentis*, he is the disposer of his own property, and his will stands as a reason for his actions.<sup>1</sup> If an illiterate person is induced to sign a deed, by a misrepresentation of its nature and contents, such deed, being obtained by fraud, is void ;<sup>2</sup> but if he did not request it to be read to him, and no false representation of its contents was made, it will not be avoided merely on the ground of his ignorance.<sup>3</sup> Even a person who is deaf and dumb from his birth, having, however, sufficient intellectual capacity to comprehend the nature of his acts, is not legally incapable of executing a deed ; and, although its contents are not fully communicated to him, for the want of sufficient signs, it will be sufficient if it appears that he knew he was making a conveyance of his estate.<sup>4</sup> Yet, if, by fraud and misrepresentation, a lease different from the one which was directed to be prepared be imposed upon a blind man for execution, he may afterwards treat it as a nullity.<sup>5</sup> Persons deaf, dumb, and blind from their nativity, labor under an absolute incapacity.<sup>6</sup>

§ 99. **Nor old Age alone.** — Nor does old age, alone, incapacitate a person from granting a lease. Fraud and imposition would, of course, defeat it ; but the mere circumstance of an advanced age is not a sufficient ground from which to presume imposition ; for, as Mr. Justice Buller observed in the case referred to, we have seen the greatest abilities displayed at a

<sup>1</sup> *Dods v. Wilson*, Const. 448 ; *Odell v. Buck*, 21 Wend. 142 ; *Fetrie v. Shoemaker*, 24 *id.* 85 ; *Jackson v. King*, 4 Cow. 207, 218 ; *Osmond v. Fitzroy*, 3 P. Wms. 130 ; *Toomes v. Conset*, 2 Atk. 251 ; *Sprague v. Duel*, 11 Paige, 480.

<sup>2</sup> *Jackson v. Hayner*, 12 Johns. 469 ; *White v. Small*, 2 Ca. in Ch. 103.

<sup>3</sup> *Hallenbeck v. Dewitt*, 2 Johns. 404. No affirmative proof of his knowledge of the contents is necessary. *Mallan v. Story*, 2 E. D. Smith, 331 ; *Harris v. Story*, *ib.* 363.

<sup>4</sup> *Brown v. Brown*, 3 Conn. 299 ; *Brower v. Fisher*, 4 Johns. Ch. 441 ; Co. Lit. 42, b ; *Shulter's Case*, 12 Co. 90, a.

<sup>5</sup> *Shulter's Case*, *supra* ; *Manser's Case*, 2 Co. 3, a ; and *Thoroughgood's Case*, *id.* 9, a.

<sup>6</sup> Co. Lit. 42, b ; Com. Dig. (Capacity), D. 4.

greater age than seventy-five.<sup>1</sup> So a lease made by a party under duress is not absolutely void but voidable only by him when he recovers his free agency; but he cannot avoid it under the plea of *non est factum*, for it is his deed at the time of action brought, and he can only avoid it by a special plea.<sup>2</sup>

§ 100. **Drunkenness as avoiding the Contract.** — If a person is in an extreme state of intoxication, so as to be deprived of the exercise of reason, a lease obtained from him while in that condition would be absolutely *void*.<sup>3</sup> This, however, is an extension of the old rule of law on the subject, which was, that it was only in cases where an unfair advantage had been taken of a drunken person, or some contrivance or management had been resorted to for the purpose of drawing him into drink, that equity would relieve him.<sup>4</sup> The old jurists, in fact, held that a man was not to be relieved at all from a contract which he had made while drunk.<sup>5</sup> But the modern doctrine, concurring with the civil-law writers, is now understood to be that a contract made under such circumstances is void. Under a plea of *non est factum*, therefore, a defendant will be permitted to give in evidence that he was made to sign

<sup>1</sup> *Lewis v. Pead*, 1 Ves. 19; *Waters v. Barral*, 2 Bush, 598.

<sup>2</sup> *Whelpdale's Case*, 5 Co. 119, a. *Thoroughgood's Case*, 2 Co. 9, a. By duress is meant that degree of severity, either threatened and impending or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness. 2 Greenl. Ev. § 301. Duress by mere advice, direction, influence, or persuasion, is unknown to the law. *Barrett v. French*, 1 Conn. 354.

<sup>3</sup> *Prentice v. Achorn*, 2 Paige, 30; *Dulaney v. Green*, 4 Harr. 285; *Burns v. O'Rourke*, 5 Rob. (N. Y.) 649; *Barrett v. Buxton*, 2 Aik. 167; *Pitt v. Smith*, 3 Camp. 33; *Fenton v. Holloway*, 1 Stark. 126; *Cooke v. Clayworth*, 18 Ves. 16; *In re Lynch*, 5 Paige, 120. Where a person, for any considerable part of his time, is intoxicated to such a degree as to be deprived of his ordinary faculties, it is *prima facie* evidence that he is incapable of managing his affairs, or of making a contract. *In re Tracy*, 1 Paige, 582.

<sup>4</sup> *Cory v. Cory*, 1 Ves. Sr. 19; 1 Fonb. Eq. 67; 1 Mad. Ch. 303. So *Belcher v. Belcher*, 10 Yerg. 121.

<sup>5</sup> *Beverley's case*, 4 Co. 125; *Osmond v. Fitzroy*, 3 P. Wms. 130; *Morris v. Nixon*, 7 Humph. 579.

the deed when he was so drunk that he did not know what he did.<sup>1</sup> But it is admitted that evidence of complete and total drunkenness should be adduced, and that it ought to be clear and satisfactory.<sup>2</sup> The decisions of some courts, however, would make the contract of an intoxicated man *voidable* only; and not to be avoided, if his assent has been given after he became sober.<sup>3</sup>

### SECTION III.

#### BY AND TO MARRIED WOMEN.

§ 101. **Disability of, at Common Law.** — At common law, the free agency and ability of a married woman to contract is entirely suspended during marriage, and she is incapable, without the concurrence of her husband, of making a valid lease of lands, of which they are seised in her right, or of which she is possessed in her own right. Her separate deed, being absolutely void, does not admit of confirmation; and it is only when made under a power contained in a settlement authorizing such acts, that her individual leases can be sustained. The husband has sole dominion over her lands, with a right to lease and take the rents and profits thereof, so long as the marriage relation subsists; and if a living child be born of the marriage, he has the same right during his own life, if he survives her.<sup>4</sup> He has also an exclusive and absolute power of disposing of all such leasehold interests as she may possess; though, on his failing to dispose of them in his lifetime, they belong to her in preference to his personal rep-

<sup>1</sup> *Cole v. Robbins*, Bul. N. P. 172; *Fenton v. Holloway*, 1 Stark. 126.

<sup>2</sup> *Adm'r. of Lee v. Ware*, 1 Hill (S. C.), 313; *Johns v. Fritchey*, 39 Md. 258.

<sup>3</sup> *Reinicker v. Smith*, 2 Har. & J. 421; *Arnold v. Hickman*, 6 Munf. 15; *Williams v. Inabnet*, 1 Bailey, 343; *Eaton v. Perry*, 20 Mo. 96; *Matthews v. Baxter*, L. R. 8 Exch. 132.

<sup>4</sup> *Jackson v. McConnell*, 19 Wend. 175; *Chancy v. Strong*, 2 Root, 369; Co. Lit. 46, b; 351, b; *Manby v. Scott*, 1 Sid. 120; *Zouch v. Parsons*, 3 Burr, 1805; 4 Kent, Com. 26.

representatives.<sup>1</sup> If he dies before her, he cannot dispose of them by will; but, if he survives her, they become his own absolute property.<sup>2</sup> But his power of leasing her freehold estates is restricted to the continuance of a demise, made by himself alone, beyond the period of their joint lives, unless he becomes entitled as tenant by the curtesy; in which case the lessee may remain in possession during the remainder of the term, subject to an earlier determination by the death of the lessor.<sup>3</sup>

§ 102. **Lease by Husband of Wife's Property.**—The husband's lease of his wife's lands, in which she has not joined, will only bind her during the lifetime of her husband, for after his death she may confirm or avoid it at pleasure, yet, until she avoids it by entry, it will stand good.<sup>4</sup> And the acceptance of rent by her which has accrued since the death of her husband, will be deemed evidence of its affirmance.<sup>5</sup> But a mere verbal lease by husband and wife, of her lands, or a written lease to which she is not a party, is void as to the wife, and cannot be affirmed by her assent after the death of the husband, for her consent at the commencement of the term must appear by deed.<sup>6</sup>

<sup>1</sup> *Druce v. Denison*, 6 Ves. 394; *Wildman v. Wildman*, 9 *id.* 177; *Sym's Case*, Cro. El. 33; *Loftus's Case*, *id.* 278; *Hayward v. Hayward*, 20 Pick. 517; Co. Lit. 351, b.

<sup>2</sup> *Jones v. Patterson*, 11 Barb. 572; *Hyde v. Stone*, 9 Cow. 230; *Watson v. Bonney*, 2 Sandf. 405; Co. Lit. 300, a, b; 351, a. The same result follows a divorce *a vinculo matrimonii*. *Legg v. Legg*, 8 Mass. 99; see also *Vallance v. Bausch*, 28 Barb. 633.

<sup>3</sup> *Dixon v. Harrison*, Vaugh. 46; *Miller v. Manwaring*, Cro. Car. 397; *Marquat v. Marquat*, 12 N. Y. 336.

<sup>4</sup> *Doe v. Weller*, 7 T. R. 478; *Jackson v. Holloway*, 7 Johns. 81; *Brown v. Lindsay*, 2 Hill, Ch. (S. C.) 542; *Jordan v. Wikes*, Cro. Jac. 332; *Smallman v. Agborrow*, *id.* 417; *Greenwood v. Tyber*, *ib.* 563; *Winstell v. Hehl*, 6 Bush, 58.

<sup>5</sup> *Worthington v. Young*, 6 Ohio, 313; *Trout v. McDonald*, 83 Pa. St. 144; *Wotton v. Hele*, 2 Saund. 180; but see *Winstell v. Hehl*, *supra*.

<sup>6</sup> *Turney v. Sturges*, Dyer, 91, a; *Walsal v. Heath*, Cro. El. 656; *Jackson v. Holloway*, *Winstell v. Hehl*, *supra*. We have stated what is understood to be the common law of this country on the subject of marital rights with respect to leases; but these rights have been materially modified by statute in several of the States. In New York, Pennsylvania,

§ 103. **Deed of Wife, how far Effectual.** — The common law, in fact, held every conveyance of a married woman absolutely void, except when done by matter of record, as by a fine and recovery; and even then, unless her husband was a party to the record, he might avoid it. But this mode of conveyance is now abolished by the English statutes, and has never been in force in the United States.<sup>1</sup> By local usage, however, in several if not in all the States, the wife's deed, in which her husband joined, followed by her separate acknowledgment, was held to be sufficient to pass her estate.<sup>2</sup> By the New York Colonial Act of 1771, and by similar enactments in that as well as in other States, these latter modes of conveyance, with separate acknowledgment, were established or confirmed.<sup>3</sup>

§ 104. **Wife's statutory right to convey.** — Recent legislation has still further modified the common law with respect to *the right of a married woman to control her separate estate*, giving her power to take, hold, enjoy, and dispose of property, whether leasehold or otherwise, with the rents, issues, and profits thereof; so that she may now make leases of her separate estate, and contract in reference thereto, in the same manner and with the like effect as if she were unmarried.<sup>4</sup>

Maine, New Hampshire, Massachusetts, Connecticut, Ohio, Illinois, Kentucky, Iowa, Wisconsin, Alabama, New Jersey, Indiana, and Rhode Island, the common law, which makes marriage a gift of all a woman's personal property to the husband, is, in effect, repealed; and a woman who marries without any antenuptial contract, retains her property and all her subsequent acquisitions. She can hold separate property at law as she formerly could only in equity, and is liable, so far as this goes, on her separate contracts, whether made before or after marriage.

<sup>1</sup> Meriam v. Harsen, 2 Barb. Ch. 232.

<sup>2</sup> Thatcher v. Omans, 3 Pick. 521; Davey v. Turner, 1 Dall. 11; Watson v. Bailey, 1 Binn. 470; Fowler v. Shearer, 7 Mass. 14; Gordon v. Haywood, 2 N. H. 402; Manchester v. Hough, 5 Mass. 67; Lithgow v. Kavenagh, 9 Mass. 172; Jackson v. Holloway, *supra*. The Revised Statutes of New York further provided that a non-resident *feme covert* might convey lands in that State by deed jointly with her husband, and the acknowledgment or proof of execution might be as if she were sole.

<sup>3</sup> Grout v. Townsend, 2 Hill, 554; Bool v. Mix, 17 Wend. 119; Jackson v. Gilchrist, 15 Johns. 89; Colcord v. Swan, 7 Mass. 291; Sawyer v. Little, 4 Vt. 414; Albany Ins. Co. v. Bay, 4 N. Y. 9.

<sup>4</sup> Knapp v. Smith, 27 N. Y. 277; Draper v. Stouvenal, 35 *id.* 512.

In some of the United States the husband's joinder or concurrence in the lease or conveyance of his wife's real estate is still necessary,<sup>1</sup> though in others she may convey as if she were sole, and act without his concurrence.<sup>2</sup> And a separate acknowledgment by the wife upon her private examination has also been dispensed with by statute.<sup>3</sup> She cannot, however, either separately or jointly with her husband, execute a valid power of attorney for either purpose; since the statutes which gave her a right to convey by deed do not authorize her to delegate that right to another.<sup>4</sup> And though at com-

<sup>1</sup> Thus formerly in Massachusetts, to anything more than a lease for one year: Gen. Stat. c. 108, § 2; *Child v. Sampson*, 117 Mass. 62; but this requirement is now repealed: P. S. c. 147, §§ 1-7. In New Jersey, the husband must consent. *Den v. Lawshee*, 4 Zab. 613. So in Minnesota, unless the wife is authorized by a power. Gen. Stat. 1858, c. 61, § 108. Under L. 1869, c. 56, § 4, the husband cannot, as the wife's agent or attorney, make a valid lease of her property. *Sanford v. Johnson*, 24 Minn. 172. In Pennsylvania, though the wife is vested with her antenuptial property in the broadest terms, both must join. See *Peck v. Ward*, 18 Pa. St. 506; *Thorndell v. Morrison*, 25 *id.* 326; *Shinn v. Holmes*, *id.* 142. So in Rhode Island: Gen. Stat. 1857, c. 136, §§ 4-8; Vermont: R. S. c. 65, § 2; c. 71, § 1; Maryland: Gen. L. c. 45, §§ 1-3; Ohio: see *Miller v. Hine*, 13 Ohio, 565; Indiana: R. S. c. 77, § 4; *Reese v. Cochran*, 10 Ind. 195. So in Missouri, Virginia, Kentucky, Tennessee, Alabama, Florida, Mississippi, Arkansas, Texas, and California. Under the Const. of Kansas, Sec. 9, Art. 15, establishing homesteads, a husband cannot, without the wife's consent, lease the homestead property and give possession, although the title to the same is in his name, if the lessee's possession will interfere with the enjoyment of the property by the wife. *Coughlin v. Coughlin*, 26 Kan. 116. In Delaware the common law still obtains, and joinder is necessary. *Harris v. Burton*, 4 Harringt. 66. So in Connecticut and Maryland; while in Georgia, the wife's realty vests in the husband by the marriage.

<sup>2</sup> So in Maine, Massachusetts, New Hampshire, New York, Michigan, Illinois, and Iowa. See *Prevost v. Lawrence*, 51 N. Y. 219; and in some States she may lease even to her husband: *Albin v. Lord*, 39 N. H. 196; see *State v. Hayes*, 59 *id.* 450. She may so lease in Mississippi. *Bank of America v. Banks*, 101 U. S. 240. Or she may convey to him directly. *Allen v. Hooper*, 50 Me. 371; *Farr v. Sherman*, 11 Mich. 33.

<sup>3</sup> *Blood v. Humphrey*, 17 Barb. 660; *Yale v. Dederer*, 18 N. Y. 271; *Wiles v. Peck*, 26 *id.* 42. But a separate acknowledgment is still necessary in Rhode Island: Gen. Stat. 1857, c. 136, §§ 4-8; New Jersey: *Den v. Lawshee*, 4 Zab. 613; Pennsylvania, North Carolina, and Kentucky.

<sup>4</sup> *Sumner v. Conant*, 10 Vt. 1; *Lane v. McKean*, 3 Shep. 304. An



mon law, from her general inability to contract, a married woman was not bound by an agreement to make a lease, or by any express covenant contained in a lease either at law or in equity,<sup>1</sup> yet this has been materially altered by recent statutes in several States.<sup>2</sup>

§ 105. **Married Women as Lessees at Common Law.**—The same reasons which at common law prevented a married woman from making a lease disqualified her from assuming the responsibilities of a lessee. A single woman might, of course, be a lessee, and if she afterwards married, her liabilities devolved upon her husband, and he was bound for all arrears of rent, accruing as well before as after his wife's death, during the continuance of the lease.<sup>3</sup> But a married exception, however, to this general rule now prevails in New York; for by a statute of that State, when any married woman residing out of the State shall have joined or shall join with her husband in executing a power of attorney for the conveyance of real estate, situated in the State, the conveyance executed in virtue of such power shall have the same force and effect as if executed by such married woman in her own person; provided, that the execution of the power of attorney by such married woman shall have been first duly proved, or acknowledged, according to the provision of the statutes in relation to conveyances executed by married women residing out of the State. Laws of 1835, c. 275.

<sup>1</sup> *Jackson v. Vanderheyden*, 17 Johns. 167; *Martin v. Dwelly*, 6 Wend. 1; *Butler v. Buckingham*, 5 Day, 492; *Grout v. Townsend*, 2 Hill, 554; *Ex parte Thomes*, 3 Greenl. 50; *Aldridge v. Burlison*, 3 Blackf. 201.

<sup>2</sup> Thus in New Hampshire and Massachusetts she is bound by all contracts in relation to her property or business. Mass. Gen. Stat. c. 108, § 2; *Chapman v. Foster*, 6 Allen, 136; N. H. Comp. Stat. 1853, c. 382; *Ames v. Foster*, 42 N. H. 381. So in Maryland, Michigan, and Iowa, in respect of her separate property. Md. Laws, 1867, c. 223; *Tillman v. Shackleton*, 15 Mich. 447; Iowa R. S. c. 101. In New York, by contracts in respect of her separate property or trade. N. Y. Stat. 1860, March 20; *Barton v. Beer*, 35 Barb. 178; *Coster v. Isaacs*, 1 Rob. N. Y. 176. Under Stat. 1848, such contracts must expressly refer thereto. *Coakley v. Chamberlain*, 1 Sweeny, 676. In Wisconsin, on contracts necessary for enjoyment of her separate property. *Conway v. Smith*, 13 Wisc. 128; *Leonard v. Rogan*, 20 *id.* 540. In Georgia and South Carolina, in respect to her sole trade. *Waters v. Bean*, 15 Ga. 358. And in Alabama and Mississippi, by contracts for necessities for the household. Ala. Code, § 1987; Miss. Rev. Code, 1857, c. 40.

<sup>3</sup> *Vane v. Minshall*, 1 Lev. 25; *Anon.*, 6 Mod. 239. By statute in Penn. a husband is not liable for the antenuptial debts of his wife, and if



woman was not incompetent to take a lease, nor was the express assent of her husband necessary for that purpose, for the estate vested till he dissented.<sup>1</sup> Her husband was liable for the rent which accrued during her occupation; but the landlord could have no personal remedies therefor against her, either separately or jointly with her husband.<sup>2</sup> And it made no difference that she was at the time living separate and apart from her husband; or that she had eloped, and was living in a state of adultery; or even that she was separated from her husband by a decree of divorce *a mensa et thoro*; for nothing short of a divorce *a vinculo matrimonii* would restore her ability to contract.<sup>3</sup> Yet if her husband was a non-resident alien;<sup>4</sup> or became civilly dead, or was imprisoned for life, or for a term of years, — her disability was suspended during such periods, and her capacity to contract and assume the responsibilities of a lessee was restored.<sup>5</sup>

§ 106. **May Contract as to Separate Property.** — But no incapacity to contract existed in any case where such contract was necessary to the proper use and enjoyment of her separate property;<sup>6</sup> or where she had traded as a single woman, and obtained credit as such; or had a competent maintenance secured to her by her husband, on which she was living, apart from him; or was authorized by statute to carry on business

he does not enjoy the benefits of an antenuptial lease accepted by her, it is held that he is not liable upon the lease as co-contractor, nor for the use and occupation of the premises. *Biery v. Ziegler*, 93 Pa. St. 367.

<sup>1</sup> *Swaine v. Holman*, Hob. 204; Co. Lit. 3, a. She might avoid such a lease after her husband's decease. *Vincent v. Buhler*, 22 N. Y. 450.

<sup>2</sup> *Rotch v. Miles*, 2 Conn. 638; *Edwards v. Davis*, 16 Johns. 281; *Marshall v. Rutton*, 8 T. R. 545; *Fowler v. Shearer*, 7 Mass. 14; *Albany Ins. Co. v. Bay*, 4 N. Y. 9. But see, *contra*, *Lawrence v. Heister*, 3 Har. & J. 371; *Sumner v. Conant*, 10 Vt. 1.

<sup>3</sup> *Marshall v. Rutton*, *supra*; *Lean v. Shutz*, 2 W. Bl. 1195; *Hyde v. Price*, 3 Ves. 443; *Lewis v. Lee*, 3 B. & C. 291; *Fairthorne v. Blaquire*, 6 M. & S. 73; *Rawlins v. Vandyke*, 3 Esp. 250.

<sup>4</sup> *Gregory v. Paul*, 15 Mass. 31; *Abbot v. Bayley*, 6 Pick. 89; *De Gaillon v. L'Aigle*, 1 B. & P. 357.

<sup>5</sup> *Ib.*; *Hatchett v. Baddeley*, 2 W. Bl. 1079.

<sup>6</sup> *Todd v. Lee*, 15 Wisc. 365; *Rhea v. Renner*, 1 Pet. 105; *Chauviere v. Fleige*, 6 La. Ann. 563; *Newbiggin v. Pillans*, 2 Bay, 162.

as if she were a single woman.<sup>1</sup> And she might, and still may, assume any responsibility she thinks proper on the credit of her separate property. But in such cases the contract must have direct reference to her separate estate, and can only be enforced by an appropriate proceeding in equity.<sup>2</sup> It must appear also that, when making the contract, she intended to charge her separate estate therewith; or that the consideration obtained thereby was directly beneficial to that estate.<sup>3</sup>

§ 107. **Responsible on her Covenants and for Rent.** — The passage of various legislative acts enabling a married woman to hold separate property, independently of the husband's control, has not abrogated the general rule of law which prevents her from binding herself personally for the payment of a debt. But it neither invalidates a lease, nor any of the conditions upon which it may have been granted to her. A landlord may always avail himself of the privilege of re-entry, as in other cases, if the rent is not paid, or a breach of condition happens.<sup>4</sup> Nor do these enactments interfere with her privilege of charging her separate estate at law for the payment of rent, in express terms, or by necessary implication when she makes her contract. What, in the absence of an express contract, shall be deemed sufficient evidence of her intention to charge her separate property, is a matter of some difficulty; but it seems to be generally conceded as sufficient, if the debt appears to have been contracted for the immediate benefit of her estate, or for her personal benefit upon the credit of such estate.<sup>5</sup>

<sup>1</sup> *Corbett v. Poelnitz*, 1 T. R. 5; *Baker v. Barney*, 8 Johns. 72.

<sup>2</sup> *Wheaton v. Phillips*, 12 N. J. Eq. 221; *Willard v. Eastham*, 15 Gray, 328; *Aimes v. Foster*, 42 N. H. 331; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Gage v. Gates*, 62 Mo. 412.

<sup>3</sup> *Yale v. Dederer*, 18 N. Y. 265; s. c. 22 *id.* 450; *Kantrowitz v. Prather*, 31 Ind. 62; *Wood v. Sanchey*, 3 Daly, 197; *Miller v. Hastings*, 36 Iowa, 163; *Willard v. Eastham*, *supra*. In Maryland, her estate is liable for all such debts as she, together with her husband, may expressly or by clear implication charge thereon. *Hall v. Eccleston*, 37 Md. 510.

<sup>4</sup> *Draper v. Stouvenal*, 35 N. Y. 507.

<sup>5</sup> *Curtis v. Engle*, 2 Sandf. Ch. 287; *Nixon v. Hadley*, 78 Ill. 611; *Story*, Eq. § 1380; *Jacques v. M. E. Church*, 17 Johns. 549. In Missouri,

In most States it is held that where a married woman takes a lease for years, the term becomes her separate estate, that she may contract in reference thereto, even at the moment or in the act of acquiring it, as if she were a single woman; and that the use and occupation of the premises by her also creates a charge upon such estate for the rent, on the ground that the charge grows out of the beneficial nature of the contract to her individually, and may be enforced against her separate estate as well as if directly charged thereon.<sup>1</sup>

#### SECTION IV.

##### BY A TENANT FOR YEARS OR FOR LIFE.

§ 108. **Tenant may underlet and enforce Covenants.**—Not only has the owner of the soil a right to make leases, but his tenant, so long as his interest lasts, has also a right to underlet to any person he may think proper, without consulting the landlord; for, while his interest in the premises continues, he has the absolute disposition of it, unless some agreement subsists between him and the landlord, that limits his power to do so.<sup>2</sup> And such derivative lessee may be compelled by his immediate landlord to pay rent and perform covenants,

the making of a written contract by her is said to raise a presumption that she intends to bind her separate estate. *Metr. Bk. v. Taylor*, 62 Mo. 338. But see *Willard v. Eastham*, *supra*.

<sup>1</sup> *Vandevoort v. Gould*, 36 N. Y. 689; *Yale v. Dederer*, *supra*; *Taylor v. Glenny*, 22 How. Pr. 240; *Prevost v. Lawrence*, 51 N. Y. 219; *Westervelt v. Ackley*, 62 *id.* 505; *Fiske v. McIntosh*, 101 Mass. 66. Thus an agreement for board and lodging for herself and her husband, though by parol, on a promise to pay therefor out of her separate property, bound that property. *Moxon v. Scott*, 55 N. Y. 247. No agreement will be implied between husband and wife that the former is the tenant of the latter, when they live as a common family on the land of the wife and the crops raised thereon by him belong to her. *Stout v. Perry*, 70 Ind. 501.

<sup>2</sup> *Jackson v. Harrison*, 17 Johns. 66; *Eten v. Luyster*, 60 N. Y. 252; *Shaw v. Farnsworth*, 108 Mass. 357. A change of tenants of an insured building, without the consent of the insurance company, does not vitiate the policy. *Gates v. Madison Ins. Co.*, 5 N. Y. 469.

according to the terms agreed upon between them ; although he is not liable to the original lessor for the rent reserved on the first lease, since there is no such privity between him and the original lessor, as there is between a lessee and an assignee.<sup>1</sup>

§ 109. **Estate and Liabilities of Under-lessee.**—An under-lease vests only a partial estate in the under-lessee, a reversion being left in the lessor, the duration of which is immaterial ; as it may be for a year, a day, or an hour. And if rent is reserved in the under-lease, it need not contain a power of distress, for such a power is incident to every demise at common law.<sup>2</sup> But as no privity exists between an under-lessee and the original lessor, the covenants entered into between the latter and the original lessee, though they be covenants running with the land, as to pay rent, or repair, cannot affect the under-lessee personally.<sup>3</sup> The land, however, is not discharged by an under-lease, from the claims of the original lessor, who, notwithstanding the under-lease, may proceed to distrain or evict either tenant or under-tenant if rent be in arrear, or a forfeiture shall have been incurred by his lessee.<sup>4</sup> But an assignment transfers the whole interest of the lessee to the assignee ; and the essence of the instrument, as an assignment, so far as the original lessor or strictly reversionary rights are concerned, will not be destroyed by its reserving a rent to the assignor, with a power of re-entry for non-payment ; nor by its assuming, by the use of the word *demise*, or otherwise, the character of a lease.<sup>5</sup> An assignee is personally liable to the lessor upon all covenants which run with the land ; the premises also remaining liable to a distress by the latter for rent.<sup>6</sup>

<sup>1</sup> *McFarlan v. Watson*, 3 N. Y. 286 ; *Jackson v. Davis*, 5 Cow. 129. See *Marshall v. Lippman*, 16 Hun, 110 ; *Ritzler v. Raether*, 10 Daly, 286.

<sup>2</sup> Co. Lit. 141, b ; 142, a ; *Curtis v. Wheeler*, 1 Mood. & M. 493. We have, of course, no reference to leases of land in those States where the right of distress is abolished.

<sup>3</sup> *Holford v. Hatch*, 1 Doug. 183 ; *Earl of Derby v. Taylor*, 1 East, 502 ; *Doe v. Byron*, 1 C. B. 623-626 ; *Robinson v. Lehman*, 72 Ala. 401.

<sup>4</sup> *Arnsby v. Woodward*, 6 B. & C. 519.

<sup>5</sup> *Palmer v. Edwards*, 1 Doug. 187, n. ; *Doe v. Bateman*, 2 B. & A. 168.

<sup>6</sup> *Hicks v. Dowling*, 1 Ld. Ray. 99 ; *Parmenter v. Webber*, 8 Taunt. 593 ; *Hume v. Hendrickson*, 79 N. Y. 117. The sureties of the assignee

§ 110. **Liabilities of Mesne Lessee.** — A lessee, on granting an under-lease, cannot fully protect himself from the consequences of a breach by the under-lessee, of the covenants contained in the original lease, by merely taking from him covenants corresponding to those contained in that lease, but should take a covenant of indemnity against such breach.<sup>1</sup> And a prudent under-lessee will also stipulate for the insertion of a clause to protect himself from paying rent till his lessor produces the superior landlord's receipt for the chief rent; with a further provision, that, if such rent is not paid when due, the under-lessee may pay it to the superior landlord in discharge of his own rent.<sup>2</sup> It is his duty also, when contracting for an under-lease, to inform himself of the covenants contained in the original lease; for, if he enters and takes possession of the property, he will be bound by all such covenants as relate to the land.<sup>3</sup>

being liable to the landlord, may in turn look to the sureties of a second assignee who is in default, since the doctrine of subrogation does not depend upon privity. *Bender v. George*, 92 Pa. St. 36.

<sup>1</sup> *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hatton*, 10 M. & W. 249. Thus in *Logan v. Hall*, 4 C. B. 598, a lessee who had covenanted to insure, with a condition for re-entry on breach, demised to parties with a like covenant on their part: neither lessee nor sub-lessees insured, and the lessor re-entered and ousted the lessee. On suit by the lessee against the sub-lessees for the value of his reversion, the action was held not to lie, because he had taken no covenant of indemnity; and the similar covenant given to the lessee by the sub-lessees did not cover breaches committed by him. In *Williams v. Williams*, L. R. 9 C. P. 659, the lessee had made a general covenant to repair. He made a sub-lease with like covenants. Being notified by the lessor to repair, he, in turn, notified the sub-lessee; but, being threatened with re-entry, himself repaired and sued the sub-lessee. It was held that, on the general covenant to repair, only injuries to the reversion were recoverable before the expiration of the lease.

<sup>2</sup> *Roe v. Harrison*, 2 T. R. 425. In default of payment by an intermediate tenant, and to save himself from a distress or ouster, he may pay his rent to the original landlord, and deduct the amount from the sum he owes to his landlord. *Lageman v. Kloppenburg*, 2 E. D. Smith, 126.

<sup>3</sup> *Coster v. Collinge*, 3 Mylne & K. 263. A party who enters into an agreement for an under-lease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease. *Flight v. Barton*, 3 *id.* 282. See *Porter v. Drew*, 5 C. P. D. 143.

§ 111. **Duration of Under-lease limited, — How determined. — Under-lessee may distrain.** — No tenant, however, can make an under-lease, which shall convey an interest exceeding his own in point of duration; and the demise of a tenant from year to year, to hold from year to year, will operate only during the continuance of his own tenancy.<sup>1</sup> But the interest of an under-lessee cannot be defeated by the mesne lessee's surrendering his estate in the premises to the lessor;<sup>2</sup> nor can the under-lessee's interest be determined by the original lessor's giving him a notice to quit. Such notice must be given either by the lessor to his lessee or by the mesne lessee to the under-lessee.<sup>3</sup> A tenant from year to year, who underlets from year to year, also acquires such a reversion as will entitle him to distrain for rent in arrear.<sup>4</sup> If a tenant for a term of years underlets part of the premises from year to year, and, at the expiration of the term, agrees with the lessor to hold on from month to month, in the absence of any new agreement between the tenant and undertenant, the old tenancy will continue between them.<sup>5</sup>

§ 112. **Leases for Life, how determined.** — A lease, whether at will, from year to year, or for years, made by a tenant for his own life or that of another, unless authorized by an express power, must terminate on the death of the lessor in one case, or of the *cestui qui vie* in the other; for no man can confer on another a larger estate than he himself possesses.<sup>6</sup> In New York, however, a tenant for life may, by virtue of a

<sup>1</sup> *Pike v. Eyre*, 9 B. & C. 909; *Oxley v. James*, 13 M. & W. 209; *Kelley v. Patterson*, L. R. 9 C. P. 681.

<sup>2</sup> *Brown v. Butler*, 5 Phil. 71; *Adams v. Goddard*, 48 Me. 212; *Eten v. Luyster*, 60 N. Y. 252; *Allen v. Brown*, 5 Lans. 280; *Ritzler v. Raether*, 10 Daly, 286; but see *Lennen v. Lennen*, 87 Ind. 130.

<sup>3</sup> Co. Lit. 338, b; *Doe v. Pyke*, 5 M. & S. 146; *Torriano v. Young*, 6 C. & P. 8; *Piggott v. Stratton*, 1 De G. F. & J. 33.

<sup>4</sup> *Pleasant v. Benson*, 14 East, 234; *Curtis v. Wheeler*, 1 Mood. & M. 493; *Oxley v. James*, *supra*.

<sup>5</sup> *Pierse v. Sharr*, 2 Mann. & R. 418.

<sup>6</sup> *Ex parte Smyth*, 1 Swanst. 355; *Symons v. Symons*, 6 Madd. 207; *Doe v. Butcher*, 1 Doug. 50; *Doe v. Archer*, 1 B. & P. 531; *Bowes v. E. Lond. Waterworks*, 3 Madd. 375; Co. Lit. 47, b.

power granted to him by the owner of the fee, make leases, for not more than twenty-one years, to commence in possession during his life.<sup>1</sup> But the lease of a mere tenant at will is void; having no certain interest to dispose of, the very act of letting to a stranger becomes a determination of his will. Neither can he surrender, any more than he can grant; for to surrender would be to determine his will and relinquish his estate.<sup>2</sup>

§ 113. **Leases for Years by Tenants by the Curtesy, or in Dower.** — As tenants for life cannot, unless by the aid of a statute, make leases to continue for a longer period than their own lives, it follows that, where a tenant by the curtesy or in dower makes a lease for years, it will be absolutely determined by his or her death, and no acceptance of rent, by the heir or the reversioner, can confirm it. Their lessees holding over, unless recognized by the succeeding owner as tenants from year to year, are merely tenants by sufferance.<sup>3</sup> But if the remainder-man has encouraged an expenditure by the lessee on improvements, in confidence of his continuing tenant, or has suffered him to go to the expense of rebuilding, and does not, by his answer, deny that he had notice of the lessee's proceedings, he will be precluded from controverting

<sup>1</sup> 1 R. S. 733, § 87. This power is not assignable as a separate interest, but is annexed to the estate, and will pass, unless specially excepted, by a conveyance of such estate. If so excepted, it is extinguished. It may also be released by the tenant to any person entitled to an expectant estate in the lands, and will be thereby extinguished. *Ib.* §§ 88, 89. A power given to a devisee for life, to lease for a life or lives, or for a term exceeding twenty-one years, is wholly void; and cannot be sustained on the supposition that it will be executed by making leases for not more than twenty-one years; especially where such execution would render the life-estate worthless. *Root v. Stuyvesant*, 18 Wend. 257, 315.

<sup>2</sup> *Moss v. Gallimore*, Doug. 283; *Sweeper v. Randal*, Cro. El. 156; *Birch v. Wright*, 1 T. R. 382; *Clark v. Wheelock*, 99 Mass. 14. It is held, in Missouri, that the lease of a tenant at will is good as between himself and his lessee, but that, on the determination of the former estate, the tenant's lessee becomes the tenant at sufferance of the original landlord. *Meier v. Thiemann*, 15 Mo. App. 307.

<sup>3</sup> Co. Lit. 47, b; *Rowe v. Huntington*, Vaugh. 80, 81; *Miller v. Manwaring*, Cro. Car. 397; *Coakley v. Chamberlain*, 1 Sweeny, 675.



such a lease.<sup>1</sup> A subsequent acceptance of rent, with an acknowledgment of a tenancy, may also amount to a new demise by the remainder-man, the lessee being a mere tenant at sufferance in the interval.<sup>2</sup> But, where the remainder-man or reversioner joins with the tenant for life in making a lease, it is good; and is considered, during the life of the tenant for life, as his lease and the confirmation of the remainder-man or reversioner; and, after the death of the tenant for life, it will be taken to be the lease of the remainder-man or reversioner, and the confirmation of the tenant for life.<sup>3</sup> It has been determined, however, that a lease executed by a tenant for life, in which the reversioner, who was then under age, was named a party, but did not execute, was void on the death of the tenant for life; and that a subsequent execution of it by the reversioner would not make it good.<sup>4</sup>

## SECTION V.

### BY JOINT TENANTS AND TENANTS IN COMMON.

§ 114. *Of One, passes undivided Interest. — Survivorship. — Partners.*—The general rule, with respect to property held by joint tenants or by tenants in common, is, that neither can transfer anything more than his undivided interest; but either of them may grant leases of that interest, for life, for years, or at will; or the several parties in interest may join and convey the entirety.<sup>5</sup> If one joint tenant makes a lease of his

<sup>1</sup> *Stiles v. Cowper*, 3 Atk. 692; *Jackson v. Cator*, 5 Ves. 688; *Dann v. Spurrier*, 7 *id.* 231; *Pilling v. Armitage*, 12 *id.* 78–85. But, though the remainder-man acts as agent of the life-tenant in letting, he is not estopped to recover the premises from the lessee on decease of the life-tenant during the term. *Page v. Wright*, 14 Allen, 182.

<sup>2</sup> *Doe v. Watts*, 7 T. R. 83; *Doe v. Morse*, 1 B. & Ad. 365.

<sup>3</sup> *Treport's Case*, 6 Co. 14, b; 2 Prest. Conv. 141.

<sup>4</sup> *Ludford v. Barber*, 1 T. R. 86.

<sup>5</sup> *Anderson v. Tompkins*, 1 Brock. C. C. 456–463; *Putnam v. Wise*, 1 Hill, 234; *Cunningham v. Pattee*, 99 Mass. 248. But, if one co-tenant lets a specific part, the lease is still good *inter partes*; but invalid as to



moiety for years, and dies before the lessee's entry, the lease will bind the survivor, and the lessee will retain his interest in the moiety demised until his term expires. And if one joint tenant makes a lease to commence after his death, his co-tenant, if he survives, will be bound by it.<sup>1</sup> So one or more joint tenants may demise his or their portion to another joint tenant, and thereby create the relation of landlord and tenant between them, with a right to distrain in respect of rent in arrear.<sup>2</sup> We should observe also that the rules applicable to partnership property do not apply to real estate; and hence, when real estate is held by partners in trade, for the purposes of their business, they hold as tenants in common, and not as joint tenants.<sup>3</sup>

those who do not join. *Ib.* So if the whole is demised by one co-tenant. *Taintor v. Cole*, 120 Mass. 162; *Dewitt v. Harvey*, 4 Gray, 486; *Austin v. Ahearne*, 61 N. Y. 6. So one partner's demise of the firm's real estate, even if in the name of the firm, passes only his individual interest. *Dillon v. Brown*, 11 Gray, 179. Heirs take as tenants in common. 1 N. Y. R. S. 753, § 17. So devisees, unless it is otherwise declared. Executors or trustees take as joint tenants. *Ib.* 727, § 44. Otherwise of legatees. *Putnam v. Putnam*, 4 Bradf. 308. In Massachusetts all conveyances or devises are in common, unless expressly provided otherwise, or when made to trustees or mortgagees. Pub. Stats. ch. 120, §§ 15, 16.

<sup>1</sup> *Grute v. Locroft*, Cro. El. 287; *Whitlock v. Horton*, Cro. Jac. 91.

<sup>2</sup> *Cowper v. Fletcher*, 6 B. & S. 464; *Evans v. English*, 61 Ala. 416. As to the lease of one tenant in common to his co-tenant of his undivided interest, see *Dresser v. Dresser*, 40 Barb. 300.

<sup>3</sup> *Coles v. Coles*, 15 Johns. 159; *Balmain v. Shore*, 9 Ves. 500; *Thornton v. Dixon*, 8 Bro. C. C. 199; *Dillon v. Brown*, *supra*. Thus a lease by and to a firm should be declared on in the names of the individual members: *Rohrburg v. Reed*, 57 Mo. 392; and when a lease to one partner for the firm expires at the same time as the partnership, he may take a renewal in his own name: *Mitchell v. Read*, 61 Barb. 310. So a firm which had contracted to take a lease may do so, though the firm is dissolved. *Palmer v. Sawyer*, 114 Mass. 19. But, where the term continued after the dissolution, those of the partners who occupied or let the premises were held accountable for the improved value: *Eaton's Appeal*, 66 Pa. St. 483; and a right of renewal is exercised by the surviving partner as such: *Betts v. June*, 51 N. Y. 274. And it is held that incoming partners of the lessee who hold over, are bound by the terms of the lease in like manner with the lessee. *Wilgus v. Lewis*, 8 Mo. App. 336. There may, however, be a partnership in the use of land, for farming or mining, where the law-merchant will apply and govern to the same extent as in

§ 115. **Effect of lease by. — Actions on. —** If parceners, or joint tenants, join in a lease, there can be but one lease, for they have but one freehold; but if tenants in common join in a lease, it amounts to several leases of their respective interests.<sup>1</sup> One joint tenant, or tenant in common, may make a lease of his part to his companion; and this gives him a right to take the whole profits; when before he had but a right to the moiety thereof; and he may contract with his companion for that purpose as well as with a stranger.<sup>2</sup> And where tenants in common join in a lease, reserving an entire rent, they may join in enforcing payment of it; but if there be a separate reservation to each they must each bring a separate action.<sup>3</sup> In such case, however, the survivor may sue

ordinary mercantile transactions. But in buying and selling the land itself, on the joint account of several, the land retains the character of real estate, and each associate contracts for himself: *Patterson v. Brewster*, 4 Edw. 352; *Dyer v. Clark*, 5 Met. 562; *Buchan v. Sumner*, 2 Barb. Ch. 199; except so far as partnership claims require it to be treated as personalty. *Ib.* In England it is regarded as converted out and out. *Darby v. Darby*, 3 Drewry, 495. To what extent there may be a partnership for buying and selling real estate merely, see *Sage v. Sherman*, 2 N. Y. 417; *Fall River Co. v. Borden*, 10 Cush. 485. To constitute real estate partnership property, it must not only be purchased with the funds of the firm, but must be used for partnership purposes. *Cox v. McBurney*, 2 Sandf. 561; and see *Otis v. Sill*, 8 Barb. 102; *Anderson v. Lemon*, 8 N. Y. 236.

<sup>1</sup> 2 Rol. Abr. 64; *Shep. Touch.* 268, n. 3. In Ohio it is said, tenants in common may make a joint lease. *Massie v. Long*, 2 Ohio, 287, 301.

<sup>2</sup> *Cro. Jac.* 83-611; *Keay v. Goodwin*, 16 Mass. 1. The relation of landlord and tenant is thereby created, with a right to distrain for rent in arrear. *Cowper v. Fletcher*, 6 B. & S. 464. If a tenant in common hires of his co-tenant, and for a term occupies exclusively, he is not bound, at the expiration of the term, to abandon possession, nor to make partition and occupy only one half, even though his co-tenant has given him notice to quit; it is sufficient if he offers possession of half, and does no act to prevent his co-tenant from occupying with him. *Mumford v. Brown*, 1 Wend. 52; *Campbell v. Campbell*, 21 Mich. 485. But one tenant in common does not by occupying the whole estate, if he does not exclude his co-tenant, become liable to the latter in use and occupation. *Badger v. Holmes*, 6 Gray, 118; *Austin v. Ahearna*, 61 N. Y. 6, 14; *Israel v. Israel*, 30 Md. 120; *Hutton v. Powers*, 38 Mo. 353; *Graham v. Pierce*, 19 Gratt. 28; *Barrell v. Barrell*, 25 N. J. Eq. 573.

<sup>3</sup> *Powis v. Smith*, 5 B. & A. 850. One joint tenant may receive the

for the whole rent, although the reservation is to the lessors according to their respective interests.<sup>1</sup> If tenants in common make several demises of their undivided shares, either by distinct instruments or by the same instrument, they must sever in an action; for a joint action can only be maintained on a joint demise.<sup>2</sup> But if the action be upon a covenant, and the cause of action be one and entire, tenants in common, being covenantees, must join, although the covenant be with them, and each and every of them.<sup>3</sup> If the cause of action be separate and distinct, tenants in common must sue severally, though the covenant be joint in terms; but the several interest and ground of action must distinctly appear, as in the case of covenants to pay separate rents, to tenants in common, upon demises by them.<sup>4</sup>

§ 116. **Form of Lease by Tenants in Common.** — Where tenants in common concur in granting a lease, each of them usually demises, according to his particular estate and interest; the instrument containing one grant of the whole estate, with a separate render of rent to each of the lessors, and a separate covenant for the payment of rent to each. But as, under a lease in this form, the lessors must bring separate actions for their respective portions of the rent, it is better that the demise should be joint, with one render of the entire

whole rent, and give a sufficient discharge for it. *Robinson v. Hoffman*, 4 Bing. 562. Where one such tenant receives the rents and profits, although the others may have an equitable lien on his undivided portion of the premises therefor, yet, upon his death, they are primarily chargeable upon his personal estate. *Hannan v. Osborn*, 4 Paige, 336.

<sup>1</sup> *Wallace v. McLaren*, 1 Mann. & R. 516.

<sup>2</sup> *Powis v. Smith*, 5 B. & A. 851. Tenants in common may maintain a joint action for rent due, under a sealed lease, of the joint estate, all the covenants in which are with them jointly; although, by an agreement annexed to the lease, and made part thereof, it is stipulated that half of the rent shall be paid to each. *Wall v. Hinds*, 4 Gray, 256.

<sup>3</sup> *Slingby's Case*, 5 Co. 18, b; *Withers v. Bircham*, 3 B. & C. 254; *Dorsett v. Gray*, 98 Ind. 273.

<sup>4</sup> *Servante v. James*, 10 B. & C. 410. One tenant in common may maintain an action for his share of the rents and profits against a third person, who has collected the whole. *Smith v. Marsh*, 2 Dane, Ab. 228, 449.

rent to the lessors simply, which will not prevent their taking it as tenants in common, the rent following the reversion; and, in this case, they may join in an action of covenant or sue separately in debt, at their option.

§ 117. **Partners as Parties to Leases.** — Deed of one binds the others. — Mercantile law, as we have said, has somewhat modified the doctrine above stated, *when applied to copartnership interests*. By the strict rules of the common law, one partner could not bind another to a lease, or by any other instrument under seal, unless he had previous express authority for the purpose;<sup>1</sup> and such is still the law in Tennessee.<sup>2</sup> But this doctrine has been essentially relaxed in the more commercial States; where it is held that one partner, if in the presence of his copartners, may execute a deed for them, in a transaction in which they are all concerned.<sup>3</sup> An absent partner may also be bound by a deed, executed on behalf of the firm by his copartner, provided there be either a previous parol authority, or a subsequent parol adoption of the act.<sup>4</sup> And it has even been held that the implied authority from the character or scope of the partnership business will enable a partner to bind the firm by any instrument under seal which that business requires.<sup>5</sup>

<sup>1</sup> *Harrison v. Jackson*, 7 T. R. 207; *Dillon v. Brown*, 11 Gray, 179.

<sup>2</sup> *Turbeville v. Ryan*, 1 Humph. 113.

<sup>3</sup> *Mills v. Barber*, 4 Day, 428; *Gerard v. Basse*, 1 Dall. 119; *Hart v. Withers*, 1 Penn. 285; *Grazebrook v. McCreddie*, 9 Wend. 439. The fact that a lease for co-partnership purposes is made to one member of the firm, does not authorize him to take a renewal of it in his own name and for his own benefit, and such a renewal will enure to the benefit of the firm. *Mitchell v. Read*, 84 N. Y. 556.

<sup>4</sup> *Skinner v. Dayton*, 19 Johns. 513. So, on the other hand, a lease by one partner to the firm ends with the firm: *Johnson v. Hartshorn*, 52 N. Y. 173; or if the term continues, or a right of renewal exists, this is an asset of the partnership: *Eaton's Appeal*, 66 Pa. St. 483; *Betts v. June*, 51 N. Y. 274.

<sup>5</sup> *Gram v. Seton*, 1 Hall, 262. The authority of one partner to bind the firm may be shown by circumstances. *Butler v. Stocking*, 8 N. Y. 408.

## SECTION VI.

## BY MORTGAGOR AND MORTGAGEE.

§ 118. **By Mortgagor in Possession.** — Good except as against Mortgagee. — It may happen that the lessor, at the time of making a lease, has no such interest in the premises as to entitle him to contract absolutely for the enjoyment of it. Thus a mortgagor, after the date of the mortgage, unless he has reserved possession to himself until breach, and in that case after breach by default in payment of the mortgage-money, has a mere equitable interest in the land, and not an estate which can be recognized in a court of law; for, at common law, a lease created by a mortgagor subsequent to the mortgage, or when made by a *cestui que trust*, cannot be set up in a court of law against the trustee or mortgagee.<sup>1</sup> In this respect, mortgagors are in the same situation as strangers who have no interest in the property they undertake to lease, although they may be in possession. Such leases, however, are good as between the parties, by virtue of the contract;<sup>2</sup> for as against all persons, except the mortgagee and those claiming under him, the mortgagor is to be considered owner of the land so long as he remains in possession, with the power of leasing or conveying it, subject to the incumbrance.<sup>3</sup> But a mortgagee,

<sup>1</sup> *Webb v. Russell*, 3 T. R. 393; *Keith v. Swan*, 11 Mass. 216; *Roe v. Lowe*, 1 H. Bl. 447; *Howell v. Schenck*, 4 Zab. 89.

<sup>2</sup> *Thorn v. Burton*, 1 Keb. 24.

<sup>3</sup> *Willington v. Gale*, 7 Mass. 138; *Collins v. Torry*, 7 Johns. 278; *Blaney v. Bearce*, 2 Greenl. 132. As between a mortgagor and mortgagee, or a purchaser under a foreclosure of the mortgage, the owner of the equity of redemption is entitled to the rents which become due down to the period when the purchaser under the decree of sale becomes entitled to possession; and this right accrues upon the production to the occupant of the premises of the master's or sheriff's deed. *Clason v. Corley*, 5 Sandf. 447. So where the conveyance was absolute in form, with agreement to reconvey on repayment of the purchase-money and interest, grantor to retain possession of the premises during the term, it was held that, during the term, the grantor only could maintain action for rent against the tenants of the property. *Goodwin v. Hudson*, 60 Ind. 117.

although in possession, cannot make a lease that will bind the mortgagor when he comes in to redeem.<sup>1</sup>

§ 119. **Mutual Rights of Mortgagee and Tenant under prior Lease.** — A tenant under *a lease made prior to a mortgage* cannot be dispossessed by the mortgagee, unless by virtue of a proviso for re-entry, upon the non-payment of rent or the non-performance of covenants; for the mortgagee, as assignee of the reversion, has no higher rights than the mortgagor.<sup>2</sup> But, to secure to himself the benefit of the rent and covenants, a mortgagee should give the lessee notice of the mortgage, and require payment of the rent to be made to himself; and at common law he is entitled as well to rent which has fallen due since the mortgage was made, and remains unpaid to the mortgagor, as to that which accrued due after notice; yet, until notice, the lessee is justified in paying rent to the mortgagor.<sup>3</sup>

§ 120. **Under subsequent Lease, Tenant without Right at Common Law.** — The rights of a tenant, under *a lease executed after a mortgage*, stand upon different ground. A mortgagor

<sup>1</sup> *Hungerford v. Clay*, 9 Mod. 1. Where a mortgagee becomes lessee of the mortgaged premises, and covenants to pay rent to the mortgagor until condition broken, he continues bound by his covenant, and cannot set up his mortgage against the lease. But if a lessee, after making a covenant to pay rent, takes a mortgage of the leased premises, he is released from his covenant, until the condition of the mortgage is performed, or the estate is redeemed. *Newall v. Wright*, 3 Mass. 138, 151. And see *Scott v. Fritz*, 51 Pa. St. 418.

<sup>2</sup> *Moss v. Gallimore*, Doug. 279; *Rogers v. Humphreys*, 4 Ad. & E. 299.

<sup>3</sup> *Moss v. Gallimore*, *supra*; *King v. Housatonic R. R. Co.*, 45 Conn. 226; see also *Trent v. Hunt*, 9 Exch. 14. The rents in arrear when the mortgage is executed belong to the mortgagor. *King v. Housatonic R. R. Co.*, *supra*. The mortgagor, if allowed to remain in, must distrain in the mortgagee's name. Where a tenant paid rent to his landlord (a mortgagor) before it was due, and afterwards when it became due was notified by the mortgagee to pay rent to him, it was held that his previous payment to the mortgagor was no protection for him against his liability to pay to the mortgagee. *De Nicholls v. Saunders*, L. R. 5 C. P. 589. So *Cook v. Guerra*, L. R. 7 C. P. 132; for lessee's payment to lessor is on the condition that the latter continues to be landlord. But see *Stone v. Patterson*, 19 Pick. 476, *infra*.

in possession, according to English law, is regarded as a strict tenant at will to the mortgagee, who, being the legal owner, is entitled at law to the immediate possession, and to the receipt of rent if the land is in lease; and he may enter upon the mortgagor at any time, even before default in payment of the mortgage-money, and eject him.<sup>1</sup> The mortgagor, consequently, has no power of making leases that will bind a mortgagee; and when he collects rent, he is only to be considered as receiving it, in order to pay the interest which accrues on the mortgage, by an implied authority from the mortgagee, until the latter determines his will as to possession. Hence, tenants under leases made subsequent to a mortgage may be treated as trespassers by the mortgagee, and ejected without notice.<sup>2</sup> By giving notice to such a tenant to pay rent to him, a mortgagee does not make him his tenant; and no such result will be produced, unless the tenant attorns to him for the express purpose of creating a new tenancy between himself and the mortgagee.<sup>3</sup> If the mort-

<sup>1</sup> *Doe v. Maisey*, 8 B. & C. 767; *Doe v. Giles*, 5 Bing. 421, Cro. Jac. 659. But if the mortgagor attorns to the mortgagee, he will become his tenant on the terms mutually agreed or implied. *Morton v. Woods*, 9 B. & S. 632; *West v. Fritche*, 3 Exch. 216; *Jolly v. Arbuthnot*, 4 De G. & J. 224; *Kearsley v. Phillips*, 11 Q. B. D. 621. But not if the attornment be a mere device to secure the mortgagee, as by giving him a right of distraint on the mortgagor's goods as against the mortgagor's creditors. *Jackson ex parte, Bowes in re*, 14 Ch. D. 725. A tenant who holds a mortgage on the demised premises, the money secured by which falls due on the day his lease expires, may continue to hold the premises under the mortgage — the mortgage-money not being paid — without first surrendering the premises to his landlord, although in the lease he has covenanted to yield up and surrender possession of the premises at the expiration of his term. *Shields v. Lozear*, 5 Vroom, 496.

<sup>2</sup> *Keech v. Hall*, 1 Doug. 21; *Rogers v. Humphreys*, 4 Ad. & E. 299; *Comer v. Sheehan*, 74 Ala. 452. So in Maryland, although the mortgage was defective for want of an "affidavit of consideration" the lessee having notice of the mortgage. *Russum v. Wanser*, 53 Md. 92.

<sup>3</sup> *Evans v. Elliott*, 9 Ad. & E. 342. Accordingly where such notice was coupled with authority from the mortgagor to his tenant to pay mortgagee, and this was withdrawn after several payments had been made to mortgagee, it was held, the tenant could not deny his tenancy to mortgagor: *Wheeler v. Branscombe*, 5 Q. B. 373; but if the mortgagee had entered for condition broken, payment of rent by tenant would



gagee accepts such a person as his tenant, he will, after acceptance, become tenant to the mortgagee, on such terms as are agreed upon, although he may be in possession under a lease for years from the mortgagor.<sup>1</sup>

§ 121. **Like Rules in the United States.**—The common-law doctrine on this subject prevails extensively in the United States;<sup>2</sup> and on a lease made prior to the mortgage, as the legal title vests at once by virtue of the mortgage,<sup>3</sup> the mortgagee as assignee of the reversion is generally entitled, without any attornment, to collect rent from the date of the mortgage, or if possession is reserved until breach, then upon a default, and after giving notice of his claim and requiring

have made him mortgagee's tenant: *Doe v. Barton*, 11 Ad. & E. 307, 315. In *Wilton v. Dunn*, 17 Q. B. 294; *Hickman v. Machin*, 4 H. & N. 716, the mere notice and demand by mortgagee were held insufficient to protect the tenant from paying the mortgagor, if he had not already paid the mortgagee; and the doctrine of *Pope v. Biggs*, 9 B. & C. 257, and *Waddilove v. Barnett*, 2 Bing. (N. C.) 538, that rent in arrear, at the time of such notice, could be safely paid to the mortgagee, was doubted; and the *dictum* that such notice of itself makes the lessee mortgagee's tenant, or gives a right to rent subsequent thereto, was denied and overruled in *Evans v. Elliott*, *supra*. So in *Bartlett v. Hitchcock*, 10 Bradw. (Ill.) 87, it was held that a single act of the mortgagee in demanding rent would not make the lessee a tenant, when such demand had not been acted on, so as to enable the mortgagee to recover rent *eo nomine*. See *Drakford v. Turk*, 75 Ala. 339.

<sup>1</sup> *Doe v. Bucknell*, 8 C. & P. 566. It is for the jury to say if the purchaser at the foreclosure sale has adopted the terms of the old tenancy to the mortgagor. And though the mortgagee may have so done, this is not binding on the purchaser. *Smith v. Eggington*, L. R. 9 C. P. 145. Here the mortgagees after giving notice to quit to the mortgagor's tenant, accompanied by a caveat that they thereby recognized no right to such notice, accepted rent up to the expiration thereof. This was held to bind them, but not the purchaser; and the fact that the latter also negotiated with the tenant about a lease, and meanwhile allowed him to remain in and supplied him with steam power, was held not conclusive evidence of a new tenancy.

<sup>2</sup> *Rockwell v. Bradley*, 2 Conn. 1; *Blaney v. Bearce*, 2 Greenl. 132; *Erskine v. Townsend*, 2 Mass. 493; *Odiorne v. Maxey*, 16 *id.* 39; *Simpson v. Ammons*, 1 Binn. 175; *McCall v. Lenox*, 9 S. & R. 302. But see *Jackson v. Green*, 4 Johns. 186.

<sup>3</sup> *Blaney v. Bearce*, *supra*; *Erskine v. Townsend*, *supra*.



payment to himself; subject only to the qualification, that the rent has not already been, in good faith, paid to the mortgagor.<sup>1</sup> But as no relation of landlord and tenant exists between a mortgagee and the mortgagor,<sup>2</sup> or between the mortgagee and a tenant of the mortgagor by a demise subsequent to the mortgage, the tenant may be ejected like a mortgagor without notice to quit.<sup>3</sup> On entry or demand by the mortgagee, the tenant may attorn and pay the after-accruing rent to him,<sup>4</sup> upon a new tenancy, and is not liable upon the old lease;<sup>5</sup> and in those States where the action

<sup>1</sup> *Kimball v. Lockword*, 6 R. I. 139; *Russell v. Allen*, 2 Allen, 42; *Mansony v. Bank*, 4 Ala. 746; *Baldwin v. Walker*, 21 Conn. 168, 182; *Reed v. Bartlett*, 9 Bradw. (Ill.) 267. Also to all rent then due, accrued since the mortgage, though mortgagee has not entered. *Mirick v. Hoppin*, 118 Mass. 582. And such rent will not be apportioned under a statute providing for apportionment in cases where the lessor's estate is contingent, this provision being held not to contemplate the case where the lessor's estate is terminated by reason of his own neglect. *Adams v. Bigelow*, 128 Mass. 365. A note for rent in advance, given to the mortgagor, is liable to be defeated, even in the hands of an indorsee, by proof of notice by purchaser at foreclosure sale and payment to him. *Aldrife v. Ribeyre*, 52 Ind. 182.

<sup>2</sup> 4 Kent, Com. 149; *Doe v. Mace*, 7 Blackf. 2, 4; *Bank v. Hupp*, 10 Gratt. 23, 42, 49. But the relation may be created by the mortgagor's express agreement to pay rent to the mortgagee after condition broken. See *Murray v. Riley*, 140 Mass. 490.

<sup>3</sup> *Doe v. Mace*, 7 Blackf. 2; *Rockwell v. Bradley*, 2 Conn. 1; *Babcock v. Kennedy*, 1 Vt. 457; *Steadman v. Gresset*, 18 *id.* 346. If the mortgaged estate is sold, the lessee, if he has a covenant for quiet enjoyment, is entitled to a portion of the surplus proportionate to his unexpired term; *Clarkson v. Skidmore*, 46 N. Y. 297; *aliter* if he has no such covenant: *Burr v. Stenton*, 43 *id.* 462.

<sup>4</sup> *Baldwin v. Walker*, 21 Conn. 168; *Welch v. Adams*, 1 Metc. 494; *Mass. H. L. I. Co. v. Wilson*, 10 *id.* 126; *Cook v. Johnson*, 121 Mass. 326; *Hills v. Jordan*, 30 Me. 367; *Cavis v. McClary*, 5 N. H. 529. Though in New Jersey, only after actual entry. *Sanderson v. Price*, 1 Zab. 637; *Price v. Smith*, 1 Green Ch. 516. And if he has paid in advance he is not liable for the same rent to a purchaser who bought the land without notice of such payment. *Stone v. Patterson*, 19 Pick. 476. See *Lucier v. Marsales*, 133 Mass. 454. But he is not bound to attorn, and may treat the foreclosure as an eviction. *Simers v. Saltus*, 3 Denio, 214.

<sup>5</sup> *Gartside v. Outley*, 58 Ill. 210. But the terms of the old lease may be adopted by express agreement or clear implication. *Id.* The doctrine of *Pope v. Biggs*, *supra*, however, seems to have been followed in one or

of ejectment prevails, all rent accrued after the demise laid therein can be recovered by the mortgagee.<sup>1</sup>

§ 122. **Mortgagee's Right limited in certain States.** — But the common-law rules of mortgage have been modified in many of the States, and the right of the mortgagee to collect rent somewhat limited; thus, in Vermont, he has no legal estate in the land, nor, consequently, any right of action until condition broken.<sup>2</sup> In Pennsylvania, Michigan, Georgia, and South Carolina, a mortgage is only security for a debt, and no estate vests until after foreclosure and sale;<sup>3</sup> and in California, no estate at all passes by the mortgage until

two cases: *Hutchinson v. Dearing*, 20 Ala. 798; *Clark v. Abbott*, 1 Md. Ch. 474; which relied on that case as the settled law of England, and seem unaware that it had been distinctly overruled. In *Henshaw v. Wells*, 9 Humph. 568, it is even held that rent actually paid the mortgagor can be recovered back. But this is not contended even in *Pope v. Biggs*, and seems untenable on any sound principle. In *Duff v. Wilson*, 69 Pa. St. 316, a purchaser at the foreclosure sale was held to stand on the same footing as a purchaser at a sale on execution, and entitled as assignee of the reversion. And in *Austin v. Ahearne*, 61 N. Y. 6, 18-21, the doctrine of *Pope v. Biggs* is referred to with apparent approval, and the right of the mortgagee, after notice to or attornment by the lessee, is put on the same footing as that of a voluntary grantee of the lessor, and all distinction between leases prior and subsequent to the mortgage disregarded. But these decisions lose sight of the fact that the mortgagee's assertion of title is an eviction, and the lease is thereby at an end, and the tenant in attorning to the mortgagee acknowledges his title, but does not revive the lease, unless this is expressly agreed, which is in fact creating a new lease. The doctrine of the text, and of the later English cases, is, moreover, followed in *Kimball v. Rowland*, 6 R. I. 138. And see *Cook v. Johnson*, *supra*, and *Corbett v. Plowden*, 25 Ch. D. 678.

<sup>1</sup> *Babcock v. Kennedy*, *supra*; *Bank v. Hupp*, 10 Gratt. 23, 29. And see *Turner v. Coal Co.*, 5 Exch. 932; *Litchfield v. Ready*, *id.* 939.

<sup>2</sup> *Babcock v. Kennedy*, 1 Vt. 457; *Cheever v. Rut. & B. R. R.*, 39 *id.* 653; query in Alabama, see *Smith v. Taylor*, 9 Ala. 633.

<sup>3</sup> *Myers v. White*, 1 Rawle, 853; *Ladue v. Detroit*, 13 Mich. 394; *Ragland v. Justices*, 10 Ga. 65; *State v. Laval*, 4 McCord, 336. In Iowa, Code, § 2013, the tenant's attornment to the mortgagee is void unless made "after the mortgage has been forfeited," which words are taken to intend after the mortgage has been foreclosed and the period of redemption expired; and the mortgagor is entitled to possession during the year allowed for redemption. *Mills v. Hamilton*, 49 Iowa, 105.

after foreclosure.<sup>1</sup> The common-law rules, however, apply in the New England States, and in Indiana, North Carolina,<sup>2</sup> Mississippi, and Minnesota.<sup>3</sup>

§ 123. **In New York. — Mortgagee's equitable Remedy.** — In the State of New York, the Revised Statutes have abolished the action of ejectment by a mortgagee, thereby compelling him to rely upon a special contract for possession, if he expects it, denying his right to the rents and profits of the estate so long as the land is a sufficient security for the debt, and turning him over to the courts of equity for a foreclosure and sale as his chief remedy. The mortgagee is only entitled to have a receiver of the rents and profits of the mortgaged premises appointed, after it shall satisfactorily appear that the property is not of sufficient value to satisfy the mortgage debt and costs, and that the mortgagor or other person, who is personally liable for the debt, is irresponsible or unable to pay the expected deficiency. And where under such circumstances the defendant, in a suit to foreclose a mortgage, is in possession by his tenant, who is not a party to the suit, the possession of the tenant will not be disturbed by the appointment of a receiver of rents ; but he may be ordered to attorn to the receiver and pay rent to him.<sup>4</sup>

<sup>1</sup> *Bullock v. Rogers*, 9 Cal. 123; *Polhemus v. Trainer*, 30 *id.* 685; and see 2 Washb. Real Prop. (8d ed.) 99-109.

<sup>2</sup> But see *Dunn v. Tillery*, 79 N. C. 497.

<sup>3</sup> But the mortgagee has no title to rent, so long as he is restricted from possession by stipulation in the mortgage : *Smith v. Taylor*, 9 Ala. 633; so if mortgagor holds over : *Mayo v. Fletcher*, 14 Pick. 525. In Missouri the mortgagee cannot, before condition broken, recover rent due from the mortgagor's tenant, which accrued under a lease made subsequent to the mortgage. And if the mortgagee is entitled to possession for condition broken he must enforce his rights as provided in the mortgage, and give the tenant notice before he can recover rent. *White v. Wear*, 4 Mo. App. 341.

<sup>4</sup> *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Shotwell v. Smith*, 3 Edw. 588. After such payment the mortgagor has no authority to accept a surrender, or to execute a new lease of the premises, during the continuance of the receivership. *Nealis v. Bussing*, 9 Daly, 305. The owner of the equity of redemption is at law entitled to the rents and profits of the mortgaged premises until the purchaser under the decree of foreclosure

§ 124. **In Massachusetts, Mortgagor in Possession entitled to Rents.** — In Massachusetts, also, it is held that a mortgagor, so long as he remains in possession, or until actual entry by the mortgagee, may receive the rents and profits to his own use, and is not liable to account for them to the mortgagee.<sup>1</sup> Nor is he liable even for such rent as may accrue between the time of the commencement of the action to foreclose, and the time of taking possession under an execution.<sup>2</sup> So, if a person demises an estate for a term of years, reserving rent, and afterwards mortgages the same estate to the lessee in fee, and the mortgagee refuses to pay rent, the rent is suspended, until the condition is performed or the estate redeemed.

becomes entitled to the possession of the premises. If the accruing rent becomes payable between the day of sale and the time when the purchaser will be entitled to possession by the terms of the decree and the practice of the court, such rent belongs to the owner of the equity of redemption, and not to the purchaser at the master's sale. But if the proceeds of sale are insufficient, or are probably insufficient, to pay the amount due on the mortgage, and the mortgagor or other person who is personally liable for such deficiency is insolvent, the plaintiff is, at any time, entitled to a receiver to collect the rent, and have it applied to the payment of the deficiency. *Astor v. Turner*, 11 Paige, 436; *Howell v. Ripley*, 10 *id.* 43; *Bank v. Hupp*, *supra*. After the sale, a tenant in possession, who was made a party to the suit, is bound to attorn to the purchaser, notwithstanding he holds under an unexpired lease executed by the mortgagor prior to the mortgage; and, if he refuses, may be removed by a writ of assistance. And it is not material that the original lessee, from whom the lease came by assignment to the tenant in possession, was not made a party to the foreclosure. *Lovett v. German Ref. Church*, 9 How. Pr. R. 220.

<sup>1</sup> *Boston Bank v. Reed*, 8 Pick. 459; *Gibson v. Farley*, 16 Mass. 280. A mortgagee who took possession before foreclosure was required to account for the rents and profits received, or for a fair cash rent. *Van Buren v. Olmstead*, 5 Paige, 9.

<sup>2</sup> *Mayo v. Fletcher*, 14 Pick. 525. And in a case arising in Massachusetts, where the rent was payable in advance, and the mortgagee took possession, after condition broken, as he had a right to do by the statutes of that Commonwealth, upon the first day of the quarter in which the rent was payable, the court held, that, inasmuch as the tenant had the whole of the day to make the payment in advance, and the mortgagee entered on that day and ousted him, the tenant had a sufficient excuse for not paying the rent to the mortgagor. *Smith v. Shepard*, 15 Pick. 147.

During the suspension, the lessee will be accountable for the profits, as mortgagee, towards the discharge of the interest and principal of the debt; and, if he voluntarily pays the rent, he will not afterwards be accountable, as mortgagee, for the profits during the same time.<sup>1</sup> We may observe, also, that a lessee, or his assignee, may always, in order to protect his own interest, redeem a mortgage, covering the demised premises, and given by the lessor, prior to the lease; and it makes no difference, if the leasehold premises consist of but part of the lands covered by the mortgage.<sup>2</sup>

§ 125. *Mortgagor and Mortgagee to join in Lease.* — From the foregoing observations, it is obvious that a permanent lease of land which is under mortgage at the time of the execution of the lease can only be secured by the concurrence of both mortgagor and mortgagee, the former to *demise and lease*, the latter to *ratify and confirm*. Such a lease will oper-

<sup>1</sup> *Newall v. Wright*, 3 Mass. 138; Pub. Sta. c. 181, § 23; and see *Sanford v. Pierce*, 126 Mass. 146. The purchaser at a mortgage foreclosure sale is not entitled to the rents accruing between the time of purchase and the delivery of the deed. *Cheney v. Woodruff*, 45 N. Y. 98. Where a lessor gave an order for value received to a lessee, which he accepted, to pay the accruing rent to a third person, and afterwards mortgaged the property; and the mortgagee bought it in under a foreclosure, with a full knowledge of the facts, — he was held to be estopped from claiming the rent so assigned. *Abrams v. Sheehan*, 40 Md. 446. If a tenant, with the assent of his landlord, pays interest upon a mortgage charged on the premises demised, it is equivalent to a payment of rent *pro tanto*. *Dyer v. Bowley*, 9 Moore, 196; 2 Bing. 94. Where a mortgagee becomes lessee of the mortgaged premises, and covenants to pay rent to the mortgagor until condition broken, he is bound by his covenant, and cannot set up his mortgage against the lease. But if a lessee, after making a covenant to pay rent, takes a mortgage of the leased premises, he is released from his covenant to pay rent, until the condition of the mortgage is performed, or the estate is redeemed. *Newall v. Wright*, *supra*. See *Russell v. Allen*, 2 Allen, 42.

<sup>2</sup> *Averill v. Taylor*, 8 N. Y. 44. Upon the redemption, the redeeming party has a right to an assignment of the mortgage redeemed; and, if it be recorded, a right to require the mortgagee to acknowledge the assignment. If the lessee entitled to redemption is not made a party to the foreclosure proceedings, a judgment therein is inconclusive as against him. *Lockhart v. Ward*, 45 Tex. 227.

ate during the continuance of the mortgage as the demise of the one and the confirmation of the other; but after the mortgage has been paid off, as the demise of the latter and the confirmation of the former.<sup>1</sup> Where both concur in the grant, the covenants on the lessee's part should be entered into with the mortgagee, with a view to their running with the land. If entered into with the mortgagor, they are merely covenants in gross, and so of no value to an assignee of the mortgage.<sup>2</sup> It may be stated also that a mortgagor cannot enforce the specific performance of a contract to take a lease, without first redeeming the mortgage, or obtaining the mortgagee's concurrence in the lease; though a party claiming under such a contract cannot compel the mortgagor to pay off the mortgage, in order to give effect to the lease.<sup>3</sup>

## SECTION VII.

### BY CORPORATIONS.

§ 126. **Aggregate, may Lease as natural Persons.** — Every corporation aggregate<sup>4</sup> has, unless specially restrained by its charter or by statute, a common-law right to hold, enjoy, and transmit such property as may be necessary to enable it to answer the purposes of its creation;<sup>5</sup> it may, consequently,

<sup>1</sup> Doe v. Adams, 2 Cr. & J. 232.

<sup>2</sup> Webb v. Russell, 3 T. R. 393, 679. Thus on a lease by mortgagor and mortgagee, reciting the mortgage and reserving rent, re-entry for non-payment thereof to the mortgagor, lessee is not estopped to deny mortgagor's title in an action of ejectment for breach of condition to pay rent, brought by the assignee of mortgagor and mortgagee. McAreevy v. Hannan, 13 Ir. C. L. 70. So Saunders v. Merryweather, 13 W. R. 814.

<sup>3</sup> Costigan v. Hastler, 2 Sch. & L. 160.

<sup>4</sup> A corporation aggregate is a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business, like a natural person. Per Bronson, C. J., People v. Assessors, 1 Hill, 620.

<sup>5</sup> People v. Utica Ins. Co., 15 Johns. 383; McCartee v. Orphan Asylum, 9 Cow. 437; Mayor v. Lowten, 1 Ves. & B. 226-240. This common-

make leases for a term of years, or for the life of the lessee, or at will, to the same extent that an individual may, provided they are not inconsistent with its corporate rights and responsibilities.<sup>1</sup> As a general rule, it must grant as well as take by its corporate name; but an immaterial variance of name will not avoid its grant, when the true name can be collected from the instrument, or is shown by proper averments.<sup>2</sup> And the same principles are applicable to the granting of a term for years, as of the fee.<sup>3</sup>

law right has been restricted in England since the time of Elizabeth, as to religious corporations; and such restraining acts have been generally followed in this country. In the State of New York, it is well understood that no religious corporation can sell in fee any of its real estate without an order of the Supreme Court; but they are expressly authorized by statute to demise, lease, and improve the same for the use of the congregation. This limitation of the corporate power to sell is confined to religious corporations; but all others can buy and sell at pleasure, except so far as they may be specially restricted by their charters. 2 Kent, Com. 281.

<sup>1</sup> Reynolds v. Comm'rs, 5 Ham. 205; Co. Lit. 44, a. And see Curtis v. Leavitt, 15 N. Y. 9, 62, 219, 262. But if a mode of exercising the leasing power is prescribed, this must be strictly followed, or the lease is void. Taylor v. Beebe, 3 Rob. (N. Y.) 262; Ready v. Mayor, 20 N. Y. 312. And the limit to the rights and obligations of the lease are to be found in the lessor's charter, not lessee's. Penn. R. R. v. Sly, 65 Pa. St. 85, 205.

<sup>2</sup> That the misnomer of a corporation, whether grantor or grantee, does not vitiate the grant, provided the identity of the corporation with that intended by the parties to the instrument appears, see N. Y. Inst. for the Blind v. How, 10 N. Y. 84; Sutton v. Cole, 3 Pick. 237; Minot v. Curtis, 7 Mass. 444; Chancellor of Oxford's case, 10 Co. 57. The name of the corporation need not be *idem syllabis aut verbis*: it is sufficient that it be *idem re et sensu*. Mayor of Lynn's Case, *ib.* 124.

<sup>3</sup> Angell & A. Corp. 60; N. Y. Afr. Soc. v. Varick, 13 Johns. 38; Berks Co. v. Myers, 6 S. & R. 12; Inhab. Alloway Cr. v. String, 5 Halst. 322; Sutton v. Cole, *supra*. It should be noted here that a mere community of individuals, not incorporated, cannot take real estate *in succession*, and therefore, under a grant of three persons named, for *themselves and their associates, being a settlement of friends at, &c.*, to have and to hold as tenants in common for themselves and their associates, the estate rests only in the three persons named. Jackson v. Sisson, 2 Johns. Cas. 321; Co. Lit. 3, a; Jackson v. Cory, 8 Johns. 385; Hornbeck v. Westbrook, 9 *id.* 73.



§ 127. **Bound by parol Contracts of Directors and Agents.** — A corporation at common law could do no act, *except by writing under its corporate seal*; but this doctrine has been greatly relaxed by recent decisions in England,<sup>1</sup> and is now entirely repudiated in the United States. The Supreme Court of the United States, in common with the State courts, holds, that whenever a corporation aggregate is acting within the scope of the legitimate objects of its creation, all parol contracts made by its authorized agents are binding upon it;<sup>2</sup> and that a bank, or other commercial corporation, may bind itself, by a vote of its board of directors, or by the acts of its authorized officers and agents, without the corporate seal.<sup>3</sup> The modern decisions, in fact, place corporations, with regard to their mode of making contracts, upon the same footing with natural persons. They may contract under seal, but are no otherwise obliged to do so than individuals. Like them, they are subject to the rules established by law, and cannot take or grant certain interests in land, otherwise than by deed, when similar interests can only be so taken or granted by individuals. Corporations, therefore, may now make parol leases, in the same manner and under the same restrictions that natural persons may.<sup>4</sup>

<sup>1</sup> *East Lond. Water-works v. Bailey*, 4 Bing. 283.

<sup>2</sup> *Bank v. Paterson*, 7 Cranch, 299; *Buff. Com. Bank v. Kortright*, 22 Wend. 348; *Kelley v. Mayor*, 4 Hill, 263.

<sup>3</sup> *Fleckner v. U. S. Bank*, 8 Wheat. 338; *Mott v. Hicks*, 1 Cow. 513; *Chestnut Hill Co. v. Rutter*, 4 S. & R. 16; *Danforth v. Schoharie Co.*, 12 Johns. 227; *Coppinger v. Armstrong*, 8 Bradw. (Ill.) 210. So if the lease is executed by the corporation's agent. *Crawford v. Longstreet*, 14 Vroom, 825. Where a committee appointed by a corporation for the purpose executed, as lessees, a lease purporting to run to the corporation, without any words to show in whose behalf they executed the lease, and the corporation ratified the action of the committee and entered and occupied under the lease, — it was held that the corporation was liable for the rent reserved in the lease and could not terminate its estate by a notice sufficient to determine a tenancy at will. The court said: "It is . . . clear that the defendant having accepted the lease and entered and occupied under it, is bound by its provisions, and liable to pay the rent therein reserved, to the same extent, at least, as if it were a deed poll executed by the plaintiffs." *Carroll v. St. John's Society*, 125 Mass. 565. And see *Crawford v. Longstreet*, *supra*.

<sup>4</sup> *U. S. Bank v. Dandridge*, 12 Wheat. 105; Per Marshall, C. J., *Osborn*



§ 128. **Majority of Directors may bind.** — *The board of directors are, for all business purposes, the corporation; and they may authorize a committee or an officer to lease, or otherwise dispose of, its real estate; and that power implies an authority to affix the corporate seal in all cases where it may be necessary or proper.*<sup>1</sup> A majority of such a board are competent to bind them.<sup>2</sup> It may be almost unnecessary to observe, that a corporation may accept, and will be bound by a lease, in all cases where the contract is within the scope of its corporate authority. And where a corporation entered upon and enjoyed premises pursuant to a lease purporting to be made by its agent, and paid rent thereon, it was held bound by the lease; and that the authority of the agent to contract for it could be proved as well by a subsequent ratification of his acts as by direct evidence of his appointment.<sup>3</sup>

§ 129. **Seal of, necessary in Deed.** — **How Affixed and Proved.** — Although a corporation may execute parol leases without the use of the corporate seal, its seal is still necessary, in all

*v. U. S. Bank, 9 id. 738; Garvey v. Colcock, 1 Nott & McC. 231.* Lay corporations, by the laws of New York, are restricted from granting or accepting leases, except so far as the purposes of the corporation shall require, or their charter may authorize. 1 R. S. 599. Religious incorporations also are only authorized to make leases for the use of the society, or other pious uses. Act 5 April, 1813, sess. 36, ch. 60, § 4. In *Ecc. Comm'rs v. Merral, L. R. 4. Exch. 162*, a tenancy from year to year was created by entry and occupation of land of ecclesiastical corporation under a demise not sealed with their common seal.

<sup>1</sup> *Burrill v. Bank, 2 Met. 163; Decker v. Freeman, 3 Greenl. 338.* A corporation can only act in the mode prescribed by the law creating it. *Beatty v. Mar. Ins. Co., 2 Johns. 109; Head v. P. I. Co., 2 Cranch, 127, 166.* And where a charter declared that the president and one-third of the directors should constitute a quorum for the transaction of business, and that all business might be transacted by committees, without the presence of the board, it was held that the president alone had no power to act. *Dawes v. N. Riv. Ins. Co., 7 Cow. 462.*

<sup>2</sup> *Angell & A. Corp. § 291.* Where two trustees, being a corporation, signed their names separately to a lease, and affixed the corporate seal separately to each of their names, it was held to be well executed. *Jackson v. Walsh, 3 Johns. 226.*

<sup>3</sup> *L. I. R. R. v. Marquand, 6 N. Y. Leg. Obs. 160; and see Hoyt v. Thompson, 19 N. Y. 207.*

cases where a seal would be required if the instrument were to be executed by an individual. But the corporate seal, when affixed to a contract or conveyance, does not render the instrument a corporate act, unless it is affixed by an officer or agent duly authorized to execute the instrument, or he is acting in pursuance of a vote of the board of directors of the company.<sup>1</sup> In order to authenticate the instrument, it will be necessary to prove the corporate seal in the same manner as the seal of an individual; for the common seal is not evidence of its own authenticity, but must be proved to be such, not indeed by one who saw it affixed, but by one who knows it to be the seal of the corporation it purports to be.<sup>2</sup> When the seal is affixed to the deed, it is *prima facie* evidence that it was affixed by the authority of the corporation; provided it is also proved to have been put to the deed by an officer who was intrusted by the corporation with the custody of such seal. And it lies with the party objecting to the due execution of the deed, to show that the corporate seal was affixed surreptitiously or improperly; and that all the preliminary steps to authorize the officer having the legal custody of the seal to affix it to the deed have not been complied with.<sup>3</sup>

## SECTION VIII.

### BY TRUSTEES.

§ 130. **May grant Leases.** — *Cestui que trust to join.* — Trustees of land, being the owners of the legal estate, may grant leases which cannot be impeached, so long as they are justi-

<sup>1</sup> Jackson v. Campbell, 5 Wend. 572; Bank v. Dandridge, 12 Wheat. 68; Derby Canal Co. v. Wilmot, 9 East, 360.

<sup>2</sup> Jackson v. Pratt, 10 Johns. 381; Foster v. Shaw, 7 S. & R. 156; Den v. Vreelandt, 2 Halst. 352. In New York, the seal of a corporation may be affixed by making an impression directly on the paper, and the legal effect will be the same as if made on wax or a wafer. Laws of 1848, p. 805.

<sup>3</sup> Lovett v. Steam Saw-mill Co., 6 Paige, 54; Clarke v. Imp. Gas Co., 4 B. & Ad. 315.

fied by the quantity of the estate they possess. If there are several trustees, all must act; one cannot act separately and independently of the others, for they have only a joint authority; and therefore the lease of one of several trustees is void.<sup>1</sup> A party taking a lease from trustees with notice of the trust, and without the concurrence of the person who is beneficially interested, is himself a trustee, and subject to the control of a court of equity. But the lessee of a *cestui que trust* acquires no interest without the concurrence of the trustee; he is, in fact, a mere trespasser as against the trustee, and is liable to an eviction at law without any previous notice to quit.<sup>2</sup> It is therefore expedient, as in the case of a mortgagor and mortgagee, that the trustee and *cestui que trust* should both join in a demise.<sup>3</sup> If there be several beneficiaries, the concurrence of all is necessary; for if a trustee under a will concur with some, but not all of them, in a lease which recites part only of the trust, the lessee cannot hold in opposition to the other beneficiaries, who are not parties to the lease, since such a recital renders it incumbent on him to make further inquiry, and he is to be considered as having had notice of the title of the other claimants under the will.<sup>4</sup> The rent may be reserved generally during the term, without specifying to whom it is to be paid, leaving the law to give it its due appropriation; but the covenants, to make them run with the land, should be entered into with the trustee.<sup>5</sup>

§ 131. **Duration of Leases by Trustees, may exceed Limits of the Trust Estate.** — Trustees, who hold the fee, may, however, make valid leases of the estate they represent; indeed a due execution of the trust usually requires them to exercise this power. The duration of such leases must, however, be for a reasonable period, — reasonable under the circumstances

<sup>1</sup> *Sinclair v. Jackson*, 8 Cow. 543; Story, Eq. § 1062.

<sup>2</sup> *Blake v. Foster*, 8 T. R. 487, 492.

<sup>3</sup> The trustee should *demise and lease*, and, on the part of the *cestui que trust*, words of demise should be inserted, as well as words of *consent and approbation*.

<sup>4</sup> *Malpas v. Ackland*, 3 Russ. 273.

<sup>5</sup> *Webb v. Russell*, 3 T. R. 393; s. c. 1 H. Bl. 562.

of each particular case; but they may extend beyond the period of the trust estate, subject to the jurisdiction of a court of equity to annul them if unreasonable or improper. In one case, where a testator devised his real estate to trustees, upon the trust that out of the yearly rents and profits they should pay certain annuities; and, subject thereto, should permit a person to receive the rents and profits for life; and, after his decease, permit his wife to receive them for her life, with limitations over in favor of their children,—the trustees were held to have power to demise for ten years.<sup>1</sup> So a trust created by will to receive the rents and profits of an unoccupied and unincumbered real estate which was liable to large taxes and assessments, for the lives of the testator's children, and out of the same to uphold, support, and repair, as well as to pay all charges on the land, was held to authorize a lease for twenty-one years, with a covenant to renew or to pay for buildings to be erected by the lessee.<sup>2</sup> But with reference to a devise to A. in fee, in trust for his infant son, to be conveyed to him at the age of twenty-one years, and, without imposing terms upon the trustees as to the rent, or the length or terms of lease, Lord Eldon held, that, although the trustees might do what was reasonable, they clearly could not alienate the land for a period of ninety-nine years at a stationary rent.<sup>3</sup>

§ 132. **Trustees' Leases, when void in Equity.**—Whatever may be the term for which the lease is granted, the burden of proving its reasonableness devolves upon the trustee, and the lessee claiming under him. The principle upon which a court of equity will interfere with leases made by a trustee rests on a presumption that the lessor has been guilty of a

<sup>1</sup> *Att'y-Gen. v. Owen*, 10 Ves. 555–560.

<sup>2</sup> *Greason v. Keteltas*, 17 N. Y. 491.

<sup>3</sup> *Naylor v. Arnitt*, 1 Russ. & M. 501; *Att'y-Gen. v. Owen*, *supra*. Where a testator devised a coal tract, leased at a fixed royalty, the lease to remain in the hands of the trustee under the will until the term of the lease should expire, it was held that, after the lessor's death, the trustee might sue for the arrears of royalty, whether accrued before or after the lessor's death; the executors conceding to the trustee the right of action. *Shillingford v. Good*, 95 Pa. St. 25.

breach of trust in making, and the lessee has made himself accessory to that breach of trust in accepting, an improper lease. Thus a suspicion of mismanagement will attach to a lease made for a long term of years absolute, at a stationary rent, because no man of a reasonable degree of prudence would so let his own estate;<sup>1</sup> and it is said, that, generally speaking, an alienation by trustees for ninety-nine years, if a mere husbandry lease, and without adequate consideration,<sup>2</sup> or a lease for seventy years or more, at an unvarying rent, can in neither case be upheld,—the value of such interests being but little inferior to the value of the inheritance, and no other consideration than the rent forming an inducement to the contract.<sup>3</sup>

## SECTION IX.

### BY EXECUTORS AND ADMINISTRATORS.

§ 133. **Respective Powers of.**—Executors who hold the legal estate may demise the premises which devolve upon them by the will of their testator, even before probate; but administrators have no power over or concern with the realty of their intestate except under an order made by the authority of the court which appointed them.<sup>4</sup> Both executors and ad-

<sup>1</sup> *Att'y-Gen. v. Cross*, 3 Mer. 524; *Att'y-Gen. v. Brooke*, 18 Ves. 326.

<sup>2</sup> *Att'y-Gen. v. Owen*, 10 Ves. 555; *Att'y-Gen. v. Hotham*, 1 Turn. & R. 209; *Att'y-Gen. v. F. I. Co.*, 11 Sim. 380.

<sup>3</sup> *Att'y-Gen. v. Griffith*, 13 Ves. 575; *Att'y-Gen. v. Backhouse*, 17 *id.* 290; *Att'y-Gen. v. Warren*, 2 Swanst. 304; *Att'y-Gen. v. Foord*, 6 Beav. 288.

<sup>4</sup> *Bank v. Dudley*, 2 Pet. 492; *Roe v. Summerset*, 2 W. Bl. 692; 1 Atk. 461. In Indiana, an administrator may let, pending administration, but his lease determines therewith. *Burbank v. Dyer*, 52 Ind. 392. So in Minnesota, G. S. 1866, c. 52, § 6; *Smith v. Park*, 31 Minn. 70. In Mississippi, Code 1880, § 1327, the administrator may collect the rent of land leased by the intestate for the year in which his death occurs. *Tucker v. Whitehead*, 58 Miss. 762. In Missouri, an executor may make leases for not exceeding three years. Stat. of 1843, 3, 4. In Alabama, the administrator or executor may take rents accruing after the lessor's death, and

ministrators, however, have an absolute power over terms of years granted to a testator or intestate, and may either assign or underlet them, the rent being assets in their hands.<sup>1</sup> Several executors are regarded as an individual person, and have a joint and several interest in the testator's property; the lease of one executor is therefore as valid as their joint demise would be, although it purports to be in the name of all.<sup>2</sup> The husband of a woman who is an executrix had, at common law, a joint interest with her in all the effects of the deceased, and might assume the whole administration, and act in it for all purposes, without her consent; but the wife could not do any act as executrix or administratrix without her husband's concurrence. She was therefore, with respect to terms for years which she possessed in her representative character, in no better situation during the marriage than in the case of terms for years to which she was entitled in her own right.<sup>3</sup>

§ 134. *Leases by, where void in Equity. — Legatee to be joined.* — It is also said that *leases by executors or administrators*, though good at law, are voidable in equity, unless shown by the lessees to be in the course of a due administration of the assets of the testator or intestate; an under-lease granted by an administratrix was consequently set aside, where the lessee had notice that a division of the property had been agreed upon, and that a lease was not therefore required by the parties who were beneficially interested.<sup>4</sup> A person taking from

may rent or sell lands for the purpose of paying the lessor's debts. 1 Brick. Dig. p. 937, §§ 330–333; *Palmer v. Steiner*, 68 Ala. 400. See *Houston v. Farris*, 71 *id.* 570; *Farris v. McCurdy*, 74 *id.* 162. And the administrator may repair in order to make the premises tenantable. *Vandegrift v. Abbott*, 75 *id.* 487. If the heirs assent, an administrator may, as such, control the renting of the real estate. *Stearns v. Stearns*, 1 Pick. 157; *Choate v. Arrington*, 116 Mass. 552.

<sup>1</sup> Bac. Abr. Leases, I. 7. And rent on such lease goes to the executor or administrator, and not to intestate's representative. *Drew v. Bayly*, 2 Lev. 100.

<sup>2</sup> *Simpson v. Gutteridge*, 1 Madd. 616; *Bedell v. Constable*, Vaugh. 179; *Roe v. Hodgson*, 2 Wils. 129; *Beaufort v. Berty*, 1 P. Wms. 702; *Doe v. Sturges*, 7 Taunt. 217.

<sup>3</sup> Chamb. Leases, 35.

<sup>4</sup> *Drohan v. Drohan*, 1 Ball & B. 185; *Evans v. Jackson*, 8 Sim. 217.

an executor a lease of premises specifically bequeathed to another, should therefore, if possible, obtain the concurrence of the legatee; for, after the executor's assent to the bequest, the legal title vests in the legatee, at whose suit an action of ejectment will lie against the purchaser.<sup>1</sup>

## SECTION X.

### BY GUARDIANS.

§ 135. **Powers to Lease at Common Law now generally superseded.**— Guardians of infants, who were in the nature of guardians in socage, might, at common law, demise the infant's lands for a term of years not extending beyond the infant's age of fourteen years.<sup>2</sup> And such demises might be in the guardian's own name, and without leave of the court; for he had not merely a bare authority, but an interest in the land descended.<sup>3</sup> But a term extending beyond that period was voidable, provided the infant was then entitled to choose his own guardian; and it might be avoided or affirmed by a subsequent guardian chosen by the infant.<sup>4</sup> The common-law distinctions of guardians have, however, in this country, been essentially superseded in practice by guardians appointed by the courts of chancery or of probate; who, as well as testamentary guardians, are now vested with all the rights of a guardian in socage, during the whole of an infant's minority.<sup>5</sup>

<sup>1</sup> *Paramour v. Yardley*, Plowd. 539; *Westwick v. Wyer*, 4 Co. 28, b; *Doe v. Guy*, 3 East, 120. So *Fenton v. Clegg*, 9 Exch. 680.

<sup>2</sup> *Doe v. Hodgson*, 2 Wils. 129; *Bacon v. Taylor*, Kirby, 368; *Thacker v. Henderson*, 63 Barb. 271.

<sup>3</sup> *Thacker v. Henderson*, *supra*.

<sup>4</sup> *Shopland v. Ryoler*, Cro. Jac. 55–98; *Jones v. Brewer*, 1 Pick. 314; *Snook v. Sutton*, 5 Halst. 133; *Van Doren v. Everitt*, 2 South, 460; *Emerson v. Spicer*, 46 N. Y. 594.

<sup>5</sup> *Byrne v. Van Hoesen*, 5 Johns. 66; *Field v. Scheffelin*, 7 Johns. Ch. 154. They, accordingly, not merely may but must lease the ward's land, and are accountable for losses from omitting so to do. *Hughes Minors' App.*, 53 Pa. St. 500; *Campau v. Shaw*, 15 Mich. 226. And as a guard-



It is generally understood that his authority continues until the majority of his ward, and is not controlled by the election of the infant when he arrives at the age of fourteen.<sup>1</sup>

## SECTION XL

### BY COMMITTEES AND RECEIVERS.

§ 136. *Powers of, how derived.* — The committee of a lunatic were at first considered as bailiffs, and having no permanent interest in the estate could not make leases of the lunatic's lands without an express order of the court appointing them.<sup>2</sup> And even the court could not enable them to grant an absolute interest, or one that the lunatic, on his recovery to a healthy condition of mind, might not terminate.<sup>3</sup> But the

ian has an interest and not merely a power, he cannot lease to himself. *Cayley v. O'Neill*, 1 Lans. 214. In Massachusetts, however, a guardian has no interest in the ward's property, but a naked power only. *Hicks v. Chapman*, 10 Allen, 463. But he may make a lease in his own name of the ward's property mutually binding on himself and the lessee. *Id.* *Mansur v. Pratt*, 101 Mass. 60, 62.

<sup>1</sup> *Matter of Nicoll*, 1 Johns. Ch. 25; *Matter of Dyer*, 5 Paige, 534; *Putnam v. Ritchie*, 6 *id.* 390; 2 N. Y. B. S. 151, § 10. In Massachusetts, South Carolina, and Maryland, it is held that the father, as natural guardian of an infant, has no authority to make a lease of the infant's land. *May v. Calder*, 2 Mass. 55; *Anderson v. Darby*, 1 Nott. & McC. 369; *McGruder v. Peter*, 4 Gill & J. 323. And in California a lease for a longer period than the infancy of the ward is void. *Ross v. Gill*, 4 Cal. 250. A general guardian may collect and sue for his ward's share of rent collected from premises owned in part by his ward. *Coakley v. Mahar*, 35 Hun, 157. And where the guardian is bound to lease property owned by his ward subject to dower, it is held that he may lease the widow's interest together with that of the ward. See *Neel's Appeal*, 3 Penny. (Pa.) 66. A lease being made by the guardian of a minor, it seems that the latter may collect the rents falling due on the lease after his coming of age. *People v. Ingersoll*, 20 Hun, 316.

<sup>2</sup> *Foster v. Merchant*, 1 Vern. 262; *Knipe v. Palmer*, 2 Wils. 130; *Brooks v. Brooks*, 3 Ired. 389. A mere bailiff cannot lease his employer's lands otherwise than at will; but a power may be conferred on him for the purpose. *Shopland v. Ryoler*, Cro. Jac. 55, 98.

<sup>3</sup> *Ex parte Dikes*, 8 Ves. 79.



statutes of England, as well as of the various United States, now authorize such committees to make specific leases, independent, in point of duration, of the lunatic's restoration to sanity. It is customary also for courts to make orders for the appointment of a receiver, for the protection, care, and management of the estates of suitors pending a litigation before them. And in all these cases the rules and orders of the courts constitute the law for the governance of such committees and receivers, who are, in fact, regarded simply as officers of the court which appointed them, and always act under its direction.<sup>1</sup>

## SECTION XII.

### BY AGENTS.

**§ 137. May execute Leases. — Who may be. — How authorized.** — A lease may be executed by an authorized agent, as well as by the proprietor himself. According to the "Touchstone," "if an agent have a letter of attorney, or other authority, he may make leases for another; but herein caution must be had of

<sup>1</sup> Hence, one who agrees to take a lease from receivers is not entitled to a covenant binding them to rebuild in case of accidental fire caused by his negligence. *Bodman v. Murphy*, 35 Md. 154. A general rule of the Supreme Court of New York — Rule 92 — authorizes a receiver, who is appointed by the court, to receive and collect all dues, demands, and rents payable to the debtor; and he may, without any special order of the court, make leases from time to time as may be necessary, for a term not exceeding one year. And see *Shreve v. Hankinson*, 34 N. J. Eq. 413. He may also apply for and obtain an order of course, that the tenants attorn to and pay their rent to him. But a receiver of the property of a judgment debtor, appointed in pursuance of proceedings supplementary to an execution, becomes vested with the title of the debtor by virtue of his appointment, and may maintain all actions incidental to a reversionary estate in the land. *Porter v. Williams*, 9 N. Y. 142. A tenant in possession under a lease executed by a receiver appointed in an action brought against executors holding, as such, a leasehold interest in the premises, is not a tenant of such executors, so as to authorize them or their assigns to institute summary proceedings to remove him. *People v. McAdam*, 22 Hun, 559.

three things: 1. That the authority be good; 2. That he that is the attorney do pursue the authority strictly; 3. That he do it in the name of his principal, and not in his own name.”<sup>1</sup> As to the persons who may act as agents, there seems to be little or no restriction; one may, in fact, act as the agent of another, who is disqualified from acting on his own account,—as an infant, a married woman, or an alien.<sup>2</sup> His authority may be shown as well by a subsequent ratification, or an adoption of his acts by the principal, as by an original appointment.<sup>3</sup> An appointment is *directly* proved by express words of appointment, either verbally or in writing. It may be *indirectly* established by proof of the relative situation of the parties, or of their habit and course of dealing and intercourse, or from the nature of the employment, as well as from subsequent ratification.<sup>4</sup> An agent appointed to contract for the granting of a lease need not be thereunto authorized in writing, under the Statute of Frauds; for, to constitute a valid executory agreement relating to lands by an agent, it is only necessary that the agent be lawfully authorized to make the contract.<sup>5</sup> But an appointment under seal

<sup>1</sup> Shep. Touch. 270; Combe's Case, 9 Co. 76. But an authority to collect a rent does not authorize the agent to lease. Ind. M. Union v. C. C. C. & I. R. R. 45 Ind. 281; Davidson v. Blumor, 7 Daly, 205.

<sup>2</sup> Co. Lit. 52, a; Hopkins v. Mollineaux, 4 Wend. 465; Chastain v. Bowman, 1 Hill (S. C.), 270; Gove v. Buzzard, 4 Leigh, 231.

<sup>3</sup> Townsend v. Inglis, Holt, N. P. 278; Haughton v. Ewbank, 4 Camp. 88; Brehn v. Jersey City F. Co., 38 N. J. 74; and the ratification relates back to the original transaction: Lawrence v. Taylor, 5 Hill, 113; Frost v. Deering, 21 Me. 156.

<sup>4</sup> Story on Agency, §§ 239-260. A principal is responsible for the acts of his agent, not only where he has actually given authority to the agent thus to represent and act for him, but where he has by his words, or his acts, or both, caused or permitted the person with whom the agent deals, to believe him to be clothed with this authority; and a man may thus be held liable as a principal, because he has in some way justified all persons in believing that he has constituted some other person his agent. 1 Pars. Cont. 134.

<sup>5</sup> Clinan v. Cooke, 1 Sch. & L. 22, 31; Boyland v. Warner, 1 Hayes & J. 79, 88; Turnbull v. Trout, 1 Hall. 336; McComb v. Wright, 4 Johns. Ch. 667; Lawrence v. Taylor, 5 Hill, 107; Yerby v. Grigsby, 9 Leigh, 387. An agency by parol authorizes the agent to execute a written lease without seal, in the name of his principal. Lake v. Campbell, 18 Ill. 109.

is necessary where his authority extends to the execution of a lease under seal, or to the demise of any incorporeal hereditament which cannot be granted otherwise than by deed;<sup>1</sup> and in cases where written authority to the agent may not be sufficient to give validity to the deed in a court of law, for want of a seal, equity will compel the principal to ratify and confirm the deed.<sup>2</sup> If the deed, however, is executed in the presence of the principal, and at his request, no other authority to the agent is necessary.<sup>3</sup> A power of attorney does not admit of delegation to another, unless it contains a power of substitution; for *potestas delegata non potest delegari*.<sup>4</sup> And, whenever it is necessary to record a lease, the power must be recorded also.<sup>5</sup>

<sup>1</sup> *Blood v. Goodrich*, 9 Wend. 68; *Horsley v. Rush*, cited 7 T. R. 209; *White v. Cuyler*, 6 *id.* 176; *Cooper v. Rankin*, 5 Binn. 613; *Plummer v. Russell*, 2 Bibb, 174; *Banorgue v. Hovey*, 5 Mass. 40; *McWhorter v. McMahan*, 10 Paige, 386, per Chancellor Walworth: "It is insisted by the appellant's counsel that, to constitute a lawfully authorized agent to make the contract, he must have written authority. Such, however, is not the construction which had been put upon the former Statute of Frauds; and the Revised Statutes have not changed the law in this respect. The law of 1813 required conveyances and leases which were to transfer an interest in lands *in præsenti*, to be signed by the party, or his agent lawfully authorized in writing. But, in the Revised Statutes, the words *by writing* are left out, so that it is only necessary the agent should be lawfully authorized. Under this section, and the corresponding provision in the English Statute of Frauds, it had long been settled that to make a valid executory contract for the sale of lands or an interest therein, it was not necessary that the authority of the agent should be in writing, but only that the agreement itself should be in writing, and should be signed by him as such agent." 1 Sugd. Vend. 186, 10th Lond. ed.; *Clinan v. Cooke*, 1 Sch. & L. 29. To the same effect is *Champlin v. Parish*, 11 Paige, 405.

<sup>2</sup> *Harrison v. Jackson*, 7 T. R. 207; Story, Agency, § 49. An agent cannot bind his principal by deed unless he has authority by deed so to do. *Hanford v. McNair*, 9 Wend. 54. The law is settled in this commonwealth that the unauthorized execution of a deed in the name either of a partnership or of an individual may be ratified by parol. Per Gray, C. J., in *Holbrook v. Chamberlain*, 116 Mass. 161.

<sup>3</sup> *Gardner v. Gardner*, 5 Cush. 483; *Wood v. Goodridge*, 6 *id.* 120.

<sup>4</sup> *Combe's Case*, 9 Co. 75, b.

<sup>5</sup> *Stewart v. Hall*, 3 B. Mon. 220.

§ 138. **Agreement for Lease by, binds Principal. — Acts beyond Authority.** — Supposing the agent to have authority, an agreement for a lease, as well as a lease executed in pursuance thereof, will effectually bind the principal; and if the person, at the time of entering into such an agreement, is acting as the agent of another in negotiating a lease, it is not material whether, at that moment, he intends the agreement to be for the benefit of his principal or of himself; because, in either case, the principal will be entitled, as against him, to the benefit of the contract.<sup>1</sup> And although the authority of an agent must, in general, be strictly pursued, yet there are cases where his acts have been sustained when he has exceeded his authority;<sup>2</sup> as if, having power to lease for ten years he makes a lease for twenty, it is good for the ten years, because so far it is a good execution of the power, and will be supported in equity;<sup>3</sup> though at law, according to some of the earlier English decisions, it would seem not to be good *pro tanto* even for the ten years.<sup>4</sup> But an acquiescence of the principal, after

<sup>1</sup> Taylor v. Salmon, 4 Myl. & C. 134; Lees v. Nuttall, 1 Russ. & M. 53; s. c. 2 Myl. & K. 819. Where a tenant for years, upon the expiration of his term, applied to the attorney who executed the lease for a renewal, who answered that he had no authority, but that he might keep possession until he heard from the landlord; he was held to be a mere tenant at sufferance, and not entitled to notice to quit. Jackson v. Parkhurst, 5 Johns. 128.

<sup>2</sup> Batty v. Caswell, 2 Johns. 48; Fenn v. Harrison, 3 T. R. 757; Munn v. Comm. Co., 15 Johns. 44; Pickering v. Busk, 15 East, 38; Gordon v. Buchanan, 5 Yerg. 71. In general, an authority must be strictly pursued in order to bind the principal; but, whatever may be the form or manner, it will bind the principal if such be the certain and obvious intention of the parties. The authority must be strictly followed, in all matters of substance; but the whole instrument will be considered, in order to ascertain the intention of the parties and the extent of the authority. Pars. Merc. Law, 145; Long v. Colburn, 11 Mass. 97; Townsend v. Hubbard, 4 Hill, 357.

<sup>3</sup> Sugd. Pow. 545; Perry v. Bowen, Nels. 87; Alexander v. Alexander, 2 Ves. 644; Campbell v. Leach, Ambl. 740. A lease of land given during the absence of the owner from the country, by an agent having only authority to take charge of the land while he was gone, and make it pay the best way he could, is terminable by the owner on his return. Antoni v. Belknap, 103 Mass. 193.

<sup>4</sup> Roe v. Prideaux, 10 East, 158.

knowledge of the act done for him by another, will generally be considered sufficient evidence of a ratification of such act.<sup>1</sup>

§ 139. **Act under Power to be in Name of Principal.** — Another general rule with regard to the execution of an authority is, that an act done under a power of attorney must be done in the name of the person who gives the power, and not in the attorney's name; and if it appears from the deed that the seal is in fact the seal of the agent and not of the principal, the latter cannot be made liable upon any covenant contained in it, nor will the instrument pass any estate or interest of the principal. Thus, where a deed purporting to have been made between A., by B., his attorney, of the one part, and C., of the other part, stated in the attestation clause that B., as the attorney of A., had set his hand and seal thereto, it was held not to bind A., for that the addition of the word "attorney" was merely descriptive.<sup>2</sup> But if the execution of a deed really appears to be in the name and on account of the principal, the form of words used in the execution of it is not material; thus it has been held sufficient, where opposite the seal was written, "for S. B. (the principal), by C. D. (the attorney)." <sup>3</sup>

§ 140. **Lease must appear to be by the Principal.** — A distinction is also to be observed between a *bare act* as the execution

<sup>1</sup> *Amory v. Hamilton*, 17 Mass. 103; *Kingman v. Pierce*, *id.* 247; *Wilks v. Back*, 2 East, 142; *Bogart v. Debussy*, 6 Johns. 94; *Fowler v. Shearer*, 7 Mass. 19; *Hopkins v. Mehaffy*, 11 S. & R. 126; *Harper v. Hampton*, 1 Har. & J. 622; *McClain v. Doe*, 5 Ind. 237.

<sup>2</sup> *Townsend v. Hubbard*, 4 Hill. 351; *Berkeley v. Hardy*, 5 B. & C. 355; *Borcherling v. Katz*, 37 N. J. Eq. 150; *Elwell v. Shaw*, 16 Mass. 42; *Dean v. Roesler*, 1 Hilt. 420; *Samuel v. Scott*, 13 Phila. 64. Where therefore a lease was in the name of the agent, the addition of the word "agent" to the signature did not make the lease of his principal. *Seyfert v. Bean*, 83 Pa. St. 450; *Schaeffer v. Henkel*, 57 How. Pr. 97. So an action for use and occupation will not lie against the principal when there is an outstanding lease in the name of the agent. *Kiersted v. Orange & Alex. R. R.* 55 *id.* 51. But a parol letting by the agent of an undisclosed principal makes the party put into possession by the agent the tenant of the owner. *Charter Oak Life Ins. Co. v. Cummings*, 13 Mo. App. 76.

<sup>3</sup> *Wilks v. Back*, *supra*; *Spencer v. Field*, 10 Wend. 87; *Mussey v. Scott*, 7 Cush. 215.

of a deed, *and the making of a contract*, in which latter case the phraseology is held to be material; for if a man describes himself in the beginning of an agreement to grant a lease as making it on behalf of another, and as his agent, but in a subsequent part of the same agreement says *he* will execute the lease, the agent himself becomes personally liable for its performance;<sup>1</sup> while a lease made by an attorney in his own name, even if he describes himself to be the agent or attorney of his principal, together with the covenants to pay rent, are void.<sup>2</sup> But the attorney is not bound, even though he had no authority to execute the deed, if it appears substantially on the face of the instrument to be the deed of the principal.<sup>3</sup> Whenever, therefore, an interest is intended to pass by an instrument of lease, it must appear, in terms, to be conveyed by the principal, in whom alone the interest is vested; for a power of attorney, as such, vests no interest in the representative, and consequently can pass none from him.

§ 141. **Proper form of Execution.** — The usual and proper form for concluding a lease executed under a power of attorney is: *In witness whereof, A. B., in pursuance of a letter of attorney hereunto annexed, bearing date, &c.* (or, if it is a general power embracing other lands, then), *in pursuance of a letter of attorney bearing date, &c., a copy of which is hereto annexed, hath set the hand and seal of the principal;* and then to write the name of the principal and deliver it as the act and deed of the principal. When executed by an attorney for several parties, it does not seem to be necessary to affix a separate seal for each person, if the seal affixed appears to have been intended to be adopted as the seal of each of the parties.<sup>4</sup>

<sup>1</sup> In a lease of a theatre, the lessee was described as "M. G., representing Messrs. C. A. C. & Co., manager of the opera company," and the lease was signed by "M. G., representing C. A. C. & Co." One clause was "The said M. G. agrees to pay," etc. It was held that M. G. was liable as principal, and that the words added to his name were descriptive merely. *Gran v. McVicker*, 8 Biss. 13.

<sup>2</sup> *White v. Skinner*, 13 Johns. 307; *Norton v. Herron*, 1 C. & P. 648.

<sup>3</sup> *Townsend v. Corning*, 23 Wend. 435; *Frontin v. Small*, 2 Ld. Ray. 1418; *Stone v. Wood*, 7 Cow. 453.

<sup>4</sup> *McDill v. McDill*, 1 Dall, 63; *Bohannons v. Lewis*, 3 T. B. Mon. 376;

§ 142. **Authority to grant does not imply authority to accept lease.** — As a general rule, an agent cannot take a lease, for his own use, of property which he is employed to let; for it is a principle of law, that he who undertakes to act for another in any matter, shall not in the same matter act for himself.<sup>1</sup> The rule here stated is similar to that which applies to the case of trustees or other agents buying property which they are intrusted to sell, for they are not allowed to derive any benefit therefrom. Therefore the assignee of a bankrupt, who takes a lease of property himself instead of selling it, is held answerable for any profit or loss upon the transaction.<sup>2</sup> And in any case of this kind, it is incumbent on a person holding the character of an agent to show that the transaction from which he derives a benefit is perfectly fair and reasonable; and that a full consideration has been given by him for a lease obtained from his principal.<sup>3</sup>

### SECTION XIII.

#### BY ALIENS.

§ 143. **Right to accept Leases limited at Common Law.** — It is a general rule of law that an alien cannot acquire title to property by mere operation of law, as by descent,<sup>4</sup> but that he may by purchase.<sup>5</sup> He may also make a grant, which will be effectual against all persons except the State; but if he purchases an estate in fee, for life, or for a term of years, the king, on office found, shall have it. Yet, until office found, he

*Yarborough v. Monday*, 2 Dev. 493; *Stabler v. Cowman*, 7 Gill & J. 284; *Ball v. Dunsterville*, 4 T. R. 313.

<sup>1</sup> Per *Ld. Thurlow*, in *Whichcote v. Lawrence*, 3 Ves. 740.

<sup>2</sup> *Ex parte Hughes*, 6 Ves. 617. See also *Ex parte James*, 8 Ves. 337.

<sup>3</sup> *Kingsland v. Barnewall*, 4 Bro. P. C. 154.

<sup>4</sup> *Jackson v. Lunn*, 3 Johns. Cas. 109; *Hunt v. Warnicke*, Hardin, 61; *Moors v. White*, 6 Johns. Ch. 360.

<sup>5</sup> *Burk v. Brown*, 2 Atk. 397; *Calvin's Case*, 7 Co. 25; *Monroe v. Merchant*, 28 N. Y. 9; *McCreery v. Allander*, 4 Har. & M. 409.



may enjoy it, for, until then, the alien is seised.<sup>1</sup> Pursuant to these general principles, and under such restrictions, the common law permitted an alien friend to take a lease of a house for a year for the benefit of trade. According to Lord Coke, however, none but an alien merchant could lease land at all, and then only as necessary to trade.<sup>2</sup> The English statutes also made leases of dwelling-houses or shops, granted to a stranger who was an artificer, void, if they extended to a term of years; only permitting leases at will, or from year to year.<sup>3</sup> But this law, so contrary to sound policy and the spirit of commerce, has been modified recently by more liberal legislation in favor of aliens;<sup>4</sup> and Mr. Chancellor Kent well questions whether any such law exists with us at all, at least in respect to the subjects of those nations with whom we have commercial treaties.<sup>5</sup>

§ 144. **Statutory right to accept or assign Leases.** — In New York by statute a resident alien who has filed his declaration of intent to become a citizen of the United States has a right for six years thereafter to take or assign, though not to make a lease.<sup>6</sup> There are similar statutory provisions in South Carolina, Indiana, Delaware, Arkansas, Rhode Island, Georgia, Tennessee, and Texas.

<sup>1</sup> Co. Lit. 2, b; 1 Prest. Con. 257; *Fairfax v. Hunter*, 7 Cranch, 603; *Orr v. Hodgson*, 4 Wheat. 453.

<sup>2</sup> Co. Lit. 2, b; *Page's Case*, 5 Co. 52, b.

<sup>3</sup> *Pilkington v. Peach*, 2 Show. 135; *Lapierre v. McIntosh*, 9 Ad. & E. 857.

<sup>4</sup> Stat. 7 and 8 Vict. c. 66, § 5. See also *Jevens v. Harridge*, 1 Wms. Saund. 6, and notes.

<sup>5</sup> 2 Kent, Com. 62. All contracts made between subjects or citizens of different countries which are at war with each other are utterly void. If made in time of peace, the right to enforce them is suspended during the war, by reason of the personal disability of an alien enemy to sue or be sued. When peace is restored, this right revives, and the contract regains its original obligation, and may be enforced. *Griswold v. Waddington*, 15 Johns. 57; s. c. 16 *id.* 438.

<sup>6</sup> 1 R. S. 720, §§ 15–20. But the Laws of N. Y. of 1845, ch. 115, provide that all leases made or to be made by aliens to citizens or to resident aliens capable of holding real estate shall be valid.



§ 145. **All Disabilities removed, where.** — In Louisiana, Pennsylvania, New Jersey, Maryland, Michigan, Illinois, Massachusetts, Connecticut, Iowa, Wisconsin, and Ohio, the disability of aliens to take, hold, and transmit real property is entirely removed. While in Florida and Maine, aliens may, by law, “take, hold, convey, or devise” real estate. In Missouri, Mississippi, California, and New Hampshire, disabilities are removed from all resident aliens, and in Kentucky, if resident for two years. In the constitution of North Carolina and Vermont it is provided that every person of good character who comes into the State and settles there, taking an oath of allegiance to the same, may thereupon purchase, and by other just means, acquire, hold, and transfer land. The disability never, of course, extended to a *denizen*, or foreigner who has been naturalized, who is as capable of being a party to a lease as a natural-born citizen.<sup>1</sup>

<sup>1</sup> 2 Kent, Com. 70; 1 Bl. Com. 374.

## CHAPTER V.

## THE INSTRUMENT OF DEMISE.

## SECTION I.

## THE FORMAL PARTS OF A LEASE.

§ 146. **Deed necessary to grant Life Estate. — Particulars of —**  
We have seen that a demise for years, being but a chattel interest, may be perfected by the entry of the lessee, without deed or other instrument in writing; but a deed has always been required for the conveyance of an incorporeal hereditament, and is consequently necessary for the creation of a lease for life. And when a demise, whether for life or years, is intended to embrace the various covenants usually entered into by the parties, it must be by deed. A deed is an instrument under seal, written or printed upon paper or parchment, and takes effect by its delivery to the grantee. If written upon stone, board, linen, leather, or the like, it is no deed; for neither of these articles was, in the opinion of the ancient jurists, so secure from alteration, and at the same time so durable, as paper or parchment.<sup>1</sup> Neither can a blank paper which has been signed, sealed, and delivered, and afterwards written upon, be considered a deed; and, forasmuch as it contained nothing when delivered, nothing passes by it. But a deed may be signed and sealed, and then filled up, provided this be done before delivery.<sup>2</sup> If made between more parties than one, there should regularly be as many copies of it as there

<sup>1</sup> Co. Lit. 229; F. N. B. 122.

<sup>2</sup> *Duncan v. Hodges*, 4 McCord, 23, g; *Perminter v. McDaniel*, 1. Hill, (S. C.) 267.

are parties; and formerly each copy was cut, or indented at the top, so that they might tally or correspond with each other. It then becomes what is technically called *an indenture*; the several copies of the same instrument being executed interchangeably by the respective parties. The copy delivered to the tenant is called the *original* lease; that retained by the landlord is the *counterpart*; but, for all practical purposes, both parts are now considered originals, and must each be stamped when stamps are required.<sup>1</sup>

§ 147. *Deeds-poll. — Acceptance of, implied.* — If the deed is only *a single instrument*, that is, signed by the grantor alone, it is not an indenture, but it is called a *deed-poll*. The former possesses some advantages over the latter, since it imports obligations on the part of the lessee, amounting to an agreement between two persons,—an office which the deed-poll cannot perform, since it is but a declaration by the party executing it of an act done or to be done by himself alone in favor of the other party. The lessee's acceptance of an interest under such an instrument will, however, be implied, unless he expressly dissents, and will render him liable for rent; although he cannot be made liable to an action of covenant, for he makes none, since a covenant can only be created by a deed executed by the covenantee; and consequently, by making use of a deed-poll, covenants on the part of a lessee are substantially dispensed with.<sup>2</sup>

<sup>1</sup> *Dudley v. Sumner*, 5 Mass. 438; *Currie v. Donald*, 2 Wash. 58. Where the lease and counterpart differ, the former controls. *Burchell v. Clark*, 1 L. R. C. P. Div. 602.

<sup>2</sup> *Thompson v. Leach*, 2 Vent. 198; *Chancellor v. Poole*, 2 Doug. 764; *Burnett v. Lynch*, 5 B. & C. 589. The words of a covenant in a lease by indenture are to be taken, however set down in the instrument, as the words of the party to whom they properly belong, or, if properly belonging to both, as the words of both. The words of an indenture, being the words of either party, are not to be taken most strongly against the one or beneficially for the other, as the words of a deed-poll are. *Beckwith v. Howard*, 6 R. I. 1. No person who is not a party to a deed can take anything by it, unless by way of remainder. *Hornbeck v. Westbrook*, 9 Johns. 73.

§ 148. **Date not essential; takes Effect from Delivery.** — The date of a lease is no part of its substance, and need not, in fact, be inserted at all; and, therefore, a mistake in the date will not vitiate the instrument.<sup>1</sup> If there is no date, or should there be an impossible date, the term will be considered as commencing from the delivery of the deed; unless some particular time for its commencement is therein specified. But if the deed has a sensible date, the word *date*, in the body of it, will refer to that period, and not to the date of delivery.<sup>2</sup> And it is always competent for either party to show that the delivery took place on a day different from that of the date.<sup>3</sup>

§ 149. **Names of Parties. — Mistake in, does not invalidate. — Alter, as to omission.** — As to the names of the parties, it may be observed that the law knows but one Christian name, and, therefore, the omission or insertion of the middle name of either party is immaterial; for a party may show that he is as well known by one name as another.<sup>4</sup> And neither a mistake in the spelling of an individual name nor a variance in the name of a corporation, which are not materially different from the true name, will invalidate an instrument.<sup>5</sup> When the lease is made by an agent or attorney, it should run, as we have said, in the name of the principal, and not of the agent; because a power of attorney gives no interest in the land, but merely authorizes the attorney to stand in the place,

<sup>1</sup> *Jackson v. Schoonmaker*, 2 Johns. 230, 234.

<sup>2</sup> *Church v. Gilman*, 15 Wend. 656; *Styles v. Wardle*, 4 B. & C. 908. An agreement, however, for the lease and occupation of land made on the Lord's day is void by statute in Massachusetts; but, if the land is subsequently entered upon and occupied, the tenant is liable for the rent. *Stebbins v. Peck*, 8 Gray, 553.

<sup>3</sup> *Steele v. Mart*, 4 B. & C. 272; *Morris v. Wadsworth*, 17 Wend. 103.

<sup>4</sup> *Games v. Stiles*, 14 Pet. 322; *Lyon v. Kain*, 36 Ill. 362. Parol evidence is inadmissible to show that a lease executed in the name of and rendering rent to one person was intended for the benefit of another. *Jackson v. Foster*, 12 Johns. 488; or that, although made on its face to A., it was for the benefit of A. and B. jointly. *Otis v. Sill*, 8 Barb. 102, 122.

<sup>5</sup> *McCarthy v. Noble*, 5 N. Y. 380; *People v. Runkel*, 9 Johns. 147.

and act in the name, of his principal.<sup>1</sup> And the person to whom the lease is made ought always to be a party; for if A. covenants with B. that C. shall enter and enjoy, this will be a mere collateral covenant and not a lease; because B., with whom it is made, is a stranger, and C., the intended lessee, is no party to the agreement.<sup>2</sup> But the omission of a lessee's name from the instrument entirely would render it invalid; for a deed without a grantee's name, and which has been left blank, to be inserted at some future time after its delivery, is absolutely void.<sup>3</sup>

§ 150. *Recitals. — Errors in, immaterial. — Exceptions. —* Recitals of former instruments, or of circumstances that have led to the making of a lease, are sometimes used by way of explanation, and for the purpose of showing the intention of the parties. But an error therein is not material, unless it be in the recital of a lease, after the expiration of which the new term is intended to commence;<sup>4</sup> or unless it shows that

<sup>1</sup> *Frontin v. Small*, 2 Ld. Ray. 1418; *Wilks v. Back*, 2 East, 142; *Seyfert v. Bean*, 83 Pa. St. 450.

<sup>2</sup> *Porry v. Allen*, Cro. El. 173; 1 Leon. 136; *Havergil v. Hare*, 3 Bulst. 251.

<sup>3</sup> *Jackson v. Titus*, 2 Johns. 430; *U. S. v. Nelson*, 2 Brock. 64; *Hayden v. Wescott*, 11 Conn. 129; *Ayres v. Harness*, 1 Ham. 368; *Edelin v. Sanders*, 8 Md. 118; *Ingram v. Little*, 14 Ga. 173. The law in England was settled as stated in the text in *Hibblewhite v. McMorine*, 6 M. & W. 200; *Davidson v. Cooper*, 11 *id.* 794; and also in New York, after an elaborate review of the authorities, in *Chauncey v. Arnold*, 24 N. Y. 330. So *Burns v. Lynde*, 6 Allen, 305; *Basford v. Pearson*, 9 *id.* 387; *Simms v. Hervey*, 19 Iowa, 290; *Drury v. Foster*, 2 Wall. 24. The cases also deny that parol authority to fill up blanks before delivery is admissible, though some expressions *contra* are found in *Chauncey v. Arnold*, and *Drury v. Foster*, *supra*; but these, like the decision in *Inhabs. v. Huntress*, 53 Me. 90, relate to alterations not material, or instruments other than conveyances.

<sup>4</sup> *Jackson v. Streeter*, 5 Cow. 529; *Bath and Montague's Case*, 3 Ch. Cas. 101; *Shep. Touch.* 77. With regard to recitals, one reason for inserting them is to prevent the parties to the lease from afterwards denying the matters recited; for a lease by deed operates like any other deed as an estoppel, and prevents the parties to it from afterwards disputing facts recited in it. But see an important qualification of this rule in 1 Greenleaf, Ev. 267.

the lessor had no interest in the subject-matter of the demise.<sup>1</sup> So a recital in a lease that a former lease of the premises granted to another person had been surrendered would not afford evidence of a surrender if the fact is otherwise.<sup>2</sup> Nor would the execution of the counterpart of a new lease, taken by the lessee prior to the determination of his former interest, with a recital that it was granted in consideration of the surrender of the former lease, produce a surrender, unless it were by operation of law; inasmuch as it did not purport of itself to be a surrender, having no words in it which could denote, or amount to, a yielding, or rendering-up of the interest of the lessee.<sup>3</sup>

§ 151. **Misrecitals, how controlled.** — If a lease for years be *granted subject to another lease*, to commence after the expiration of such lease, which is recited to have been made to a third person, when in truth there never was such a lease; or supposing one, if made, to have expired, or to have been originally void, the new demise will take effect immediately on the execution of the deed.<sup>4</sup> So if a lease for years be granted, to commence after the termination of a former lease then existing, but misrecited in a material part, the new term will commence immediately, in enumeration of years, though not in possession until the end of the former lease. But if misrecited in an immaterial part, the term will commence at the end of the existing lease.<sup>5</sup> A misrecital of the lessee's name, however, has been deemed material, when it was calculated to mislead; but a misrecital of the rent, of the time or place of payment, of the covenants, or that the lease was without impeachment of waste, will not be deemed material misrecitals of a lease.<sup>6</sup>

<sup>1</sup> *Hermitage v. Tompkins*, 1 Ld. Ray. 729; *McAreavy v. Hannan*, 13 Ir. C. L. 70.

<sup>2</sup> *Lyon v. Reed*, 13 M. & W. 285.

<sup>3</sup> *Roe v. Archb. of York*, 6 East, 86.

<sup>4</sup> *Foot v. Berkley*, 1 Vent. 83; *Bishop of Bath's Case*, 6 Co. 34, b; 36, a.

<sup>5</sup> *Miller v. Manwaring*, Cro. Car. 397.

<sup>6</sup> *Foot v. Berkley*, *supra*, per Tirrel, J.

§ 152. **Consideration to appear.**—Rent, as such, is not, as we have said, essential to a lease; for, from favor, or for a *valuable consideration paid in gross*, the tenant may have a lease without any render. But some consideration, express or implied, must appear, to give validity to the lease as a contract; and this is either a good consideration, as natural affection; or valuable, as money, or the rent reserved.<sup>1</sup> The reservation may be, not only in money, but in grain, animals, or produce; or it may consist of the personal services of the lessee. It is not, however, absolutely necessary that the exact amount of the reservation be fixed at the time of the creation of the tenancy, for this may be determined afterwards.<sup>2</sup> And if no amount of rent has been agreed upon, the tenant will still be bound to pay as much as the use and occupation of the premises are reasonably worth.<sup>3</sup>

§ 153. **As between Lessor and Lessee, fraudulent or immoral Consideration avoids Lease.**—If, however, the consideration is fraudulent, unjust, or immoral,—if, for instance, it is founded on a marriage-broking transaction, or should be contemporaneous with a loan of money, and used as a means of evading the usury laws,—the lease will be void; although, in the latter case, the proposal for connecting the loan with the lease may proceed from the lessor.<sup>4</sup> But an underlessee, not concerned

<sup>1</sup> *Failing v. Schenck*, 3 Hill, 344; *State v. Page*, 1 Spears, 408; *McFarlane v. Williams*, 107 Ill. 33. And see, *ante*, § 14.

<sup>2</sup> *Denn v. Cartright*, 4 East, 29. Chancellor Kent, 3 Com. 462, is of opinion that the best way of reserving perpetual rents, and preserving uniformity in value, is to make them payable in wheat, or other produce. The ancient leases in New York, in the manor counties, are generally of this description. It saves the interest of the persons in whose favor rent is reserved, from sinking by the depreciation of money, owing to the augmentation of gold and silver, and the accumulation of paper credit. And Adam Smith observes that such rents have preserved their value much better than those which have been reserved in money. It certainly seems to be the fairest mode of letting, as well for the landlord as the tenant; the landlord has the advantage of a prosperous harvest, and the tenant escapes the heavy loss which a year of scarcity might bring upon him.

<sup>3</sup> *Scranton v. Booth*, 29 Barb. 171; *Newell v. Lanford*, 13 Iowa, 191.

<sup>4</sup> *Brown v. O'Dea*, 1 Sch. & L. 115; *Drew v. Power*, *id.* 182; *Molloy v. Irwin*, *id.* 310; *Doe v. Gooch*, 3 B. & A. 664.

in the loan, or cognizant thereof, will not be disturbed by such a consideration.<sup>1</sup> Nor will a lease be set aside, merely on the ground of its being contemporaneous with an advance of money to the lessor, unless there be, in addition, some evidence or legal presumption that the advance was made as a means of covering usury.<sup>2</sup> As a general rule, however, a lease granted in consideration of a loan, will not, on principles of public policy, be allowed to stand; and especially, if any advantage has been taken by the lessee of the distresses of the lessor, it will be considered a mere evasion of the statute against usury.<sup>3</sup> Still, the taint of usury may be only matter of inference; and, if it can be shown that no advantage has been taken by the lessee, but on the contrary, that the circumstances are such as to render it unconscionable, on the part of the lessor, to seek to set aside the transaction, and that it would be a manifest hardship to the lessee to do so, a court of equity will not interfere. If it were otherwise, the doctrine of setting aside leases connected with a loan of money might be converted, by dishonest landlords, into an instrument of greater fraud than that which it was designed to prevent.<sup>4</sup>

§ 154. **Reservation of Rent, how expressed.** — No particular or technical form of words is necessary to constitute a reservation of rent. A demise, *provided* the lessee pays a certain rent, or in *consideration of the rent aforementioned*, will be as effectual as if it contained the words *yielding and paying*, which are the words generally made use of for this purpose.<sup>5</sup> And, as to the person in whose favor it is to be reserved, it is

<sup>1</sup> *Molloy v. Irwin, supra.* *Sed quære de hoc*, under the New York Usury Law.

<sup>2</sup> *Moore v. McKay*, Beat. 282; *Von Hollen v. Knowles*, 12 M. & W. 602.

<sup>3</sup> *Morony v. O'Dea*, 1 Ball & B. 116; *Corbet v. Segrave*, 2 *id.* 101; *Brown v. O'Dea*, 1 Sch. & L. 119; *Drew v. Power, id.* 190.

<sup>4</sup> *O'Brien v. Grierson*, 2 Ball. & B. 332; *Molloy v. Irwin, supra.* The common-law doctrine of usury, however, as stated in the text, is of limited application in this country. Usury avoids a contract in Arkansas, New York, North and South Carolina; but in other States some penalty is annexed other than avoidance.

<sup>5</sup> *Drake v. Munday*, Cro. Car. 207; *Caswell v. Districh*, 15 Wend. 379.



sufficient that the reservation be made in general terms, without saying to whom; for, in that case, the law directs the intent, according to the nature of the lessor's interest.<sup>1</sup> As if a lessee for years makes an under-lease reserving rent to *him and his heirs*, during the term, it would, nevertheless, accrue to his executors; for it is but a chattel interest, and not the freehold, which alone passes to an heir.<sup>2</sup> Being an incident to the reversion, it must follow the nature of the land out of which it is reserved; as if a man seised as heir-at-law on the part of his mother, should demise land rendering rent to him and his heirs, it must go to the heirs on the part of the mother.<sup>3</sup> And where a husband is possessed of a term of years, in right of his wife, and demises land, rendering rent, the rent after his death goes to his executors, and not to the widow.<sup>4</sup>

§ 155. **Reservation to follow the Inheritance.** — If a special reservation is made, care must be taken that it be made to him from whom the estate in the land is derived;<sup>5</sup> for, if a lessor reserves rent to himself and *his wife*, although this is good for his life, yet after his death, the wife, being a stranger, cannot have the rent;<sup>6</sup> for the same reason, if it be reserved, not to the lessor but to *his heir*, it will be bad.<sup>7</sup> But although rent, as such, cannot be reserved to a stranger, for the want of a privity of estate, such a reservation may be good as a sum in gross, for which an action in covenant will lie.<sup>8</sup> And

<sup>1</sup> *Jaques v. Gould*, 4 Cush. 384.

<sup>2</sup> *Knolles's Case*, Dyer, 5, b; 45, a; Co. Lit. 47, a.

<sup>3</sup> *Van Wicklen v. Paulson*, 14 Barb. 654; *Cother v. Merrick*, Hard. 94. An annual rent may, however, be reserved by deed, upon a grant in fee, and will be valid as a rent-charge; notwithstanding there is no reversion in the person entitled to it. *Van Rensselaer v. Hays*, 19 N. Y. 68.

<sup>4</sup> Co. Lit. 46, b; *Loftus's Case*, Cro. El. 279.

<sup>5</sup> Co. Lit. 47, a; *Hornbeck v. Westbrook*, 9 Johns. 73; *Ege v. Ege*, 5 Watts, 138. Rent can only be reserved in favor of a person having a legal estate in the land. *Gilbertson v. Richards*, 4 H. & N. 276.

<sup>6</sup> 2 Rol. Abr. 447, l. 33.

<sup>7</sup> 8 Co. 70; Co. Lit. 99, b; 213, b.

<sup>8</sup> *Frontin v. Small*, 2 Ld. Ray. 1418. But one not privy to the consideration, nor party to the deed, cannot sue thereon. *Mellen v. Whipple*, 1 Gray, 317. In *Brewer v. Dyer*, 7 Cush. 337, one whom lessee had let

if a man seised of a freehold, makes a lease for a term of years, to commence after his death, rendering rent to his heirs, this reservation will be good.<sup>1</sup>

§ 156. **Misdescription of Reversioner immaterial.** — A special reservation was anciently construed strictly according to the words employed, and if it ran to the lessor *or* his heirs, in the disjunctive, it terminated with the lessor's death; and if to the lessor, his executors, administrators, and assigns, during the term, he having a freehold, his heirs could not recover because not mentioned, nor his personal representatives, because the rent was annexed to a freehold reversion.<sup>2</sup> But the former position was held otherwise, where the covenant was to pay rent *during the term*; and the latter was soon overruled,<sup>3</sup> upon the well-established principle that rent, reserved to be paid during the term, follows the nature of the reversion, and goes to the person entitled to the reversion, though misdescribed, and that the misdescription may be rejected as surplusage.<sup>4</sup> Thus if the lessor was seised in fee his heirs could alone recover rent, though reserved to the lessor, his executors, administrators, and assigns, during the term; while, on the other hand, if the lessor had but a chattel interest his personal representatives could alone recover rent, though reserved or covenanted to be paid to him and his heirs.<sup>5</sup> If, however, it does not clearly appear whether the lessor's interest is chattel or freehold, the words of the reser-

into possession on a written agreement to pay lessor rent, was held liable to lessor on privity of consideration, though no party to the contract. But this case is doubted. *St. L. Exch. Bank v. Rice*, 107 Mass. 41, 43.

<sup>1</sup> *Oates v. Frithe*, 2 Rol. Abr. 447; Co. Lit. 99, b; 213, b.

<sup>2</sup> Co. Lit. 214, b; *Richmond v. Butcher*, Cro. El. 217.

<sup>3</sup> *Mallory's Case*, 5 Co. 112; s. c. Cro. El. 832; *Sury v. Brown, Latch*, 99; *Sacheverell v. Frogate*, 1 Vent. 161.

<sup>4</sup> *Sacheverell v. Frogate*, 1 Vent. 161, a leading case. It was admitted in this case that if the reservation were to lessor merely, without more, the rent would cease on his death, *Wootton v. Edwin*, 12 Co. 36; 11 Edw. III. 86; but the contrary opinion is given by Littleton, and is apparently approved. *Sacheverell v. Frogate*, 2 Wms. Saund. 368, *in notis*. And it may be doubted, if in this case the rent would not at this day be held to follow the reversion, and recoverable by whoever was entitled thereto.

<sup>5</sup> *Whittome v. Lamb*, 12 M. & W. 813.

vation or covenant will govern.<sup>1</sup> In like manner, where a life-tenant, with remainders over, by a conveyance operative under the Statute of Uses, had power to lease and reserve rent to himself and his heirs, it was held that the remainder-man could recover thereon, because the reservation must follow the inheritance.<sup>2</sup>

§ 157. **Exceptions, when void for Repugnancy.** — Exceptions are frequently introduced, to restrain, explain, or qualify general terms in a demise; as to except a farm out of the demise of a manor, a close out of a farm, or the like. But an exception of that which is expressly granted will be void for repugnancy; as, if a man demise a house and shops, excepting the shops; or certain lands and underwoods thereunto belonging, excepting the underwoods; or twenty acres, excepting ten acres: in each of these cases the exception is void.<sup>3</sup> So an exception of a thing to which the grantor has no right is void; and therefore a lessee for years or for life, not being lessee without impeachment of waste, cannot, on assigning over his term, except to himself the timber-trees, the gravel or clay, or the benefit of the coal-mines within the land.<sup>4</sup> But a lessee without impeachment of waste may make such an exception. So if he grant a less estate than his own; as, if lessee for years underlet for a shorter term, or lessee for life make a lease for years, in either case, the wood, underwood, and trees growing upon the land, may properly be excepted; for the mesne lessor remaining tenant, and continuing liable to his lessor, may thus secure to himself a remedy against the sub-lessee, in the event of his cutting down trees, or the like.<sup>5</sup> If a lessor intends to retain a right of way, or indeed any

<sup>1</sup> *Dollen v. Batt*, 4 C. B. N. S. 760, where the interest was held a chattel, because the reservation was to lessor, his administrators and assigns.

<sup>2</sup> *Whitlock's Case*, 8 Co. 69; *Isherwood v. Oldknow*, 3 Maule & S. 382; *Greenaway v. Hart*, 14 C. B. 340. But if the power is not followed, the reservation is void. *Yellowly v. Gower*, 11 Exch. 274.

<sup>3</sup> *Stukeley v. Butler*, Hob. 170; 3 Dy. 264, b, n, (40); *Kenson v. Reading*, Cro. El. 244.

<sup>4</sup> *Saunders's Case*, 5 Co. 12, a; *Sanders v. Norwood*, Cro. El. 683.

<sup>5</sup> *Bacon v. Gyrling*, Cro. Jac. 296; *Percy's Case*, 13 Co. 60; 1 Com. Dig. 607, Biens, H.

other right or control, over the demised property, he must expressly reserve it. But a covenant by the lessee, to pull down the corner of the house leased to him, for the purpose of letting the lessor make a cart-way over the spot, will not confer such a right.<sup>1</sup> And the reservation of a right of way on foot, and for cattle and sheep, does not give a right of way to carry manure, which implies drawing it in a carriage.<sup>2</sup>

§ 158. **Reservations, Distinguished from Exceptions.** — A reservation is properly of some right or profit, to arise from the subject of the demise, which had previously no separate existence; while an exception relates to some existing component part of the thing demised, which is capable of being severed or distinguished from it. As, in the case of a demise of all that farm called A., except a particular close, the close would pass as part of the farm without the exception; and the words of exception are considered to be the words of the lessor.<sup>3</sup> But where there is a reservation in favor of the lessor of a thing *dehors* the lease, as a way, common, or other profit; or a proviso that it shall be lawful for the lessor, at any time during the term, to cut and carry away the trees, — the words amount to a reservation, or an agreement on the part of the lessee for the lessor's enjoyment of the privilege referred to, and not to an exception.<sup>4</sup> An exception includes everything

<sup>1</sup> *Good v. Hill*, 2 Esp. 690.      <sup>2</sup> *Brunton v. Hall*, 1 Gale & D. 207.

<sup>3</sup> *Bullen v. Denning*, 5 B. & C. 842. So where a lessor of a perpetual lease with machinery reserves a "lien" on the machinery, this is held not a mortgage to him merely, but to take effect by way of reservation, or more properly exception, and valid against lessee's creditors. *Metcalf v. Fosdick*, 23 Ohio St. 114.

<sup>4</sup> *Russell & Gulwel, Cro. EL* 657. A lessor may expressly reserve by parol the crop growing on the land at the date of the lease. Such an agreement converts the crop as between the parties into personalty, and it will not pass by the lease. *Youmans v. Caldwell*, 4 Ohio, 71. So the hay may be reserved. *Jordan v. Staples*, 57 Me. 352. So in *Heald v. Build. Ins. Co.*, 111 Mass. 38, the covenant of two lessees not to remove the hay, but to feed it out to the cattle, was called a reservation, and it was held that sole title thereto vested in the lessors as it came into existence. But all these cases seem to operate rather as exceptions than reservations. *Durham Co. v. Walker*, 2 Gale & D. 326. The reservation of a right of way is a reservation to the grantor only. *Bridger v. Pierson*,

dependent on it, and necessary for its enjoyment; thus, if a lease reserves the wood, &c., it includes the right to enter and carry it away.<sup>1</sup> So, notwithstanding an exception in a lease, of certain closes or rooms which the lessee is not to use, he may still pass and repass through them, if they are so situated that he cannot otherwise have the complete enjoyment of the premises demised to him.<sup>2</sup> If there is a reasonable doubt as to the meaning of an exception in a lease, the words of the exception, being the words of the lessor, are to be construed favorably for the lessee, and against the lessor. As in a lease of certain lands, excepting and reserving all timber-trees and other trees, but not the annual fruit thereof, it was held that the apple-trees were not within the exception.<sup>3</sup> And if the exception is not specified with reasonable certainty, it is void altogether; as in the case of a demise of a manor excepting one acre, without specifying what acre.<sup>4</sup> A saving-out of an exception defeats the exception to the extent of the saving; and, therefore, if one let a manor for years, excepting the mansion-house, saving to the lessee a certain chamber, the chamber passes as if there had been no exception.<sup>5</sup>

§ 159. **Words of Demise.**—As to words of demise, we may observe that no particular form of words is necessary to constitute a lease; but whatever expressions explain the intention of the parties to be that one shall divest himself of the possession of his property, and the other take it for a certain space of time, are sufficient, and will amount to a lease for

1 Lans. 481. Where a lease for years reserves to the lessor the right to recover for any and all damage to the estate from any railway passing through the same, the lessee cannot recover for any injury caused thereby to his term of years. *Burridge v. New Alb. R. R.*, 9 Ind. 546.

<sup>1</sup> *Foster v. Spooner*, Cro. El. 17; *Cardigan v. Armitage*, 2 B. & C. 206. But by an exception of certain rooms by lessee a right of foot way, not of carriage way, is reserved. *Fort v. Brown*, 46 Barb. 366.

<sup>2</sup> *Liford's Case*, 11 Co. 52, a.

<sup>3</sup> *Bullen v. Denning*, *supra*; *Shep. Touch.* 100; *Cardigan v. Armitage*, *supra*. But see *Barnes v. Ravensworth*, 15 C. B. 512.

<sup>4</sup> *Dorrell v. Collins*, Cro. El. 6. A reservation in a lease of "one day's service, with carriage and horses" annually, on a day named, is not void for uncertainty. *Van Rensselaer v. Jones*, 5 Den. 449.

<sup>5</sup> *Leigh v. Shaw*, Cro. El. 372; 3 Dyer, 264, b, n, (40).

years, as effectually as if the most proper and permanent form of words had been made use of for that purpose.<sup>1</sup> The usual terms, however, by which a lease is made, are, "demise, grant, and to farm let;" but, according to Sir Edward Coke, the word *dedi* is sufficient to make a lease for years.<sup>2</sup> And a covenant with a man to stand seised to his use, will operate as a lease at common law.<sup>3</sup> So will a license to enter and enjoy land, or to reside in a certain house.<sup>4</sup> And where a man, by his will, declared, "I have made a lease to J. S. for twenty-one years, he paying but twenty shillings rent," it was held to be a good lease for twenty-one years, and that the word *have* should be taken in the present tense, and equivalent in significance to the word *grant* in a deed of feoffment, by which the party is estopped from denying the creation of an estate.<sup>5</sup> An agreement that A. shall have, occupy, and enjoy land, will enure as a lease, if it appears to be the intention of the parties to create the present relation of landlord and tenant.<sup>6</sup> But if a forfeiture would be incurred by making a lease, and the intent of the parties does not clearly appear, the courts will construe it as an agreement for a lease, and not a lease.<sup>7</sup> And it has been held that if the owner of premises sells and transfers them by written instrument, and there is also a separate agreement between himself and the vendee (founded on a sufficient consideration other than the sale of the premises) that a third person shall be tenant to the vendee from year to year, this agreement being collateral to the sale, and not a condition thereof, creates such a tenancy, though not inserted in the instrument.<sup>8</sup>

<sup>1</sup> Hallett v. Wylie, 3 Johns. 47; Thornton v. Payne, 5 *id.* 74; Bac. Abr. tit. Lease; Maverick v. Lewis, 3 McCord, 211. Morrill v. Mackman, 24 Mich. 279.

<sup>2</sup> Co. Lit. 301, b. The term *grant* includes a *demise* or *lease*. Darby v. Callaghan, 16 N. Y. 71, 75.

<sup>3</sup> Right v. Thomas, 3 Burr. 1446.      <sup>4</sup> Right v. Proctor, 4 Burr. 2209.

<sup>5</sup> 2 Bend. 7. That a recital in a will is an estoppel to all claiming under the will, see Denn v. Cornell, 3 Johns. Cas. 174.

<sup>6</sup> Hallett v. Wylie, *supra*, 1 Rol. Abr. 847, l. 40; Whitlock v. Horton, Cro. Jac. 92; Evans v. Thomas, *id.* 172; Doe v. Ashburner, 5 T. R. 163.

<sup>7</sup> Lady Montague's Case, Cro. Jac. 301.

<sup>8</sup> Denn v. Cartright, 4 East, 29. See *ante*, c. 1, § 1.

§ 160. **Proper Description, what. — Uncertainty, how far explainable.** — A proper description of the premises constituting the subject-matter of the demise is important, for the purpose of passing all the property intended to be comprised in the lease, as well as for giving effect to the instrument; since, if it does not ascertain the premises with reasonable certainty, it is void.<sup>1</sup> But if the description given affords sufficient means of ascertaining and identifying the land which is intended to pass, it is all that is required, notwithstanding there may be errors or inconsistencies in some of the particulars.<sup>2</sup> It is not, however, generally advisable to particularize too minutely all the various circumstances of name, place, boundary, and occupation; such only as are sufficient for purposes of identity should be introduced; for, where numerous circumstances are referred to, they tend to confusion, and questions frequently arise how far they must concur in distinguishing the demised premises, and to what extent words of particular explanation may qualify words of general description.<sup>3</sup> But,

<sup>1</sup> *Dingman v. Kelley*, 7 Ind. 717; *Bailey v. White*, 41 N. H. 337; *Kea v. Robson*, 5 Ired. Eq. 375. A lessee in possession under the lease will be estopped to set up the want of a sufficient description therein in defence to an action upon the covenants contained in the lease. *Hoyle v. Bush*, 14 Mo. App. 408. Where the terms of demise were stated by the landlord in the following letter, "I propose to let the premises to you as I described them," and stating the rent, to which letter the proposed tenant replied accepting the proposal and suggesting further terms and propositions, it was held that there was not a sufficient description of the premises to constitute a letting. *Jarboe v. Mulrey*, 49 N. Y. S. C. 525. It is held that a lease with insufficient description may be put in evidence in an action for rent accrued to prove the contract as to rent, and the damages for unlawful detainer. *Whipple v. Shewelter*, 91 Ind. 114.

<sup>2</sup> *Worthington v. Hylyer*, 4 Mass. 196; *Vose v. Bradstreet*, 27 Me. 156; *Bosworth v. Sturtevant*, 2 Cush. 392; *Eggleson v. Bradford*, 10 Ohio, 312; *Campbell v. Johnson*, 44 Mo. 247. If the description of property intended to be conveyed includes a number of particulars, all of which are essential to ascertain its identity, no estate will pass except such as will agree with every part of the description; but, if the tract intended to be conveyed is indicated with reasonable certainty, it will pass, although in some respects the description is erroneous. *McLoughlin v. Bishop*, 85 N. J. 512.

<sup>3</sup> A description of premises, though imperfect, is sufficiently certain if the boundaries can be ascertained with reasonable certainty, especially if possession has been taken. *Pierce v. Minturn*, 1 Cal. 470. Where land



as a general rule, applicable to this as well as to other parts of the contract of lease, all inaccuracies and uncertainties may be explained by evidence outside of the instrument of demise if such evidence neither varies nor contradicts the written contract.<sup>1</sup>

is leased in gross, there can be no question made that the land was less in quantity than described. *Leavitt v. Murray*, Wright, 707.

<sup>1</sup> *Putnam v. Bond*, 100 Mass. 58. In construing written documents, regard, as a rule, is to be had to all their parts; and general words may be restrained by particular recitals. If a lease operates two ways, the one consistent with the intention of the parties, and the other repugnant to it, effect will be given to the intent. *Quackenboss v. Lansing*, 6 Johns. 49. Although the intent of the parties be in opposition to the strict letter of the contract, it must prevail when clearly ascertained from it. *Hathaway v. Power*, 6 Hill, 453; *Tracy v. Albany Exch. Co.*, 7 N. Y. 474; *Marvin v. Stone*, 2 Cow. 781; *Orphan Asyl. Soc. v. Waterbury*, 8 Daly, 35; *Browning v. Wright*, 2 B. & P. 13; *Solly v. Forbes*, 4 Moore, 448; *Goodtitle v. Bailey*, Cowp. 600. A promise is to be interpreted in that sense in which the promisor knew that the promisee understood it. *Barlow v. Scott*, 24 N. Y. 40. When two clauses are so inconsistent with or repugnant to each other, that both cannot stand, the first will be enforced and the latter rejected, but it is the duty of the court to reconcile them if possible. *Gould v. Womack*, 2 Ala. 83; *Herrick v. Hopkins*, 23 Md. 217; *Havens v. Dale*, 18 Cal. 359; *Daniel v. Veal*, 32 Ga. 589. The granting clause generally controls. *Webb v. Webb*, 29 Ala. 588. Where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it be introduced, the lease must be construed as if that word were inserted, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it. *White v. Eagan*, 1 Bay, 247; *Wight v. Dickson*, 1 Dow. 141. A sweeping clause, at the end of a particular specification, will not pass any property of a different nature from that particularly set forth. *Smith v. Strong*, 14 Pick. 128; *Barnard v. Martin*, 5 N. H. 586. An instrument of demise agreed to let for a year, but most of the subsequent stipulations were inapplicable to a tenancy determinable by a notice to quit; it appeared on its face to have originally contained words creating a tenancy from year to year, which had been struck out; such words were allowed to explain the intention of the parties to have been to lease for a year only; and it was held that the terms inapplicable to such a tenancy must be expunged, or construed as only applicable in case the tenancy should continue. *Strickland v. Maxwell*, 4 Tyrw. 346; *Hull v. Fuller*, 7 Vt. 100. It has been held that an indefinite description in a lease might be supplied from an accurate description of the same premises contained in an assignment of the leasehold interest. *Hunt v. Campbell*, 83 Ind. 48.



§ 161. **Incidents pass by the Grant.** — In general, the grant of a thing passes the incident as well as the principal, though the latter only is mentioned; and this effect cannot be avoided without an express reservation.<sup>1</sup> Thus, the lease of a building passes everything belonging to it, or which is essential to its enjoyment; and if of a *messuage*, or mansion, includes not only the dwelling-house, but all the out-houses, barns, stables, cow-house, and dairy, if they be parcel of the mansion, although they be not under the same roof, or lie contiguous to it.<sup>2</sup> A garden is parcel of a house, and passes without the addition of the word *appurtenances*.<sup>3</sup> By the grant of a piece of ground, a necessary right of way to it, over the grantor's land, also passes. So a grant of *trees* carries a power to enter on the land, and cut and carry them away.<sup>4</sup> The word *land* passes all that grows or is built upon its surface; including

<sup>1</sup> *Pattison v. Hull*, 9 Cow. 747; *Rood v. N. Y. & E. R. R.*, 18 Barb. 80; *Skull v. Glennister*, 16 C. B. N. S. 81.

<sup>2</sup> *Kerslake v. White*, 2 Stark. 508; *Riddle v. Littlefield*, 53 N. H. 513. The lease of a hotel, with the furniture therein, embraces whatever goods, furniture, utensils, and other appendages, are necessary or convenient for carrying on the business. *Ball v. Golding*, 27 Ind. 173. A lease of a ground floor abutting on a yard also belonging to the lessor and forming part of the same tenement, carries the right to have the windows looking on the yard remain unobstructed. *Doyle v. Lord*, 64 N. Y. 432, see also *Riviere v. Bower*, Ryan & M. 24. And a tenant having a right to light and air, as against his co-tenant, the landlord's consent to the co-tenant's obstruction of the same cannot justify such obstruction. *Spies v. Dam*, 54 How. Pr. 293. It is the general rule that an easement will enure to the owners of the several parts into which the dominant estate may be divided; so that the burden on the servient estate is not enhanced. *Outerbridge v. Phillips*, 13 Abb. (N. C.) 117. But a tenant of one room has not an exclusive right to the outer wall. *Pevey v. Skinner*, 116 Mass. 129.

<sup>3</sup> *Bettisworth's Case*, 2 Co. 32; Plow. 171; 1 Inst. 5, b. The general principle that a lease of land carries with it the minerals upon the land, applies only where the contract relates to the land generally, without exception or reservation. *Shaw v. Wallace*, 1 Dutch. 453.

<sup>4</sup> Per Best, C. J., *Holmes v. Goring*, 2 Bing. 83; *Clarke v. Cogge*, Cro. Jac. 170. On a lease of premises together with all ways appertaining, or with any parts thereof used or enjoyed, a right of way passes, although not expressly mentioned, upon proof that it is used with the premises at the time the lease is granted. *Kooystra v. Lucas*, 5 B. & A. 830.

buildings, trees, fixtures, and fences.<sup>1</sup> A *farm* includes houses and lands; while a *grange* will include not only barns, but stables and out-houses used for the purpose of husbandry.<sup>2</sup> But the demise of a *house* or barn, without other words to extend its meaning, will pass no more land than is necessary for its complete enjoyment.<sup>3</sup> In some cases, a grant of the produce of the soil will pass the soil itself; thus *pasture* will be taken not only as the privilege of feeding on the land, but as the land itself. So the grant of a *wood* will pass the soil as well as the timber. And where the issues and profits of the land were demised for a term of years, the land itself was held to pass; for to have the issues and profits was said to be the same thing as to have the land itself.<sup>4</sup>

§ 162. **But not the indirect Incidents.** — This principle, however, is to be understood as *applying only to such things as are directly incident to the grant*, and necessary to the enjoyment of the thing granted; therefore an easement which does not naturally and necessarily belong to the premises will not

<sup>1</sup> Canfield v. Foord, 28 Barb. 336; Green v. Armstrong, 1 Den. 550; Mott v. Palmer, 1 N. Y. 564. The word "land," when used alone in Dutch deeds, means arable land only. Van Gorden v. Jackson, 5 Johns. 440. A conveyance of the fee of the land does not pass growing trees previously sold. Warren v. Leland, 2 Barb. 613.

<sup>2</sup> Co. Lit. 4, a; Burton v. Brown, Cro. Jac. 648; Isham v. Morgan, 9 Conn. 374; *In re* N. Y. C. R. R. 50 N. Y. 414. Seventy acres, lying and being in the southwest corner of a section, is a good description, and the land will lie in a square. Walsh v. Ringer, 2 Ohio, 327; and see Cockrell v. McQuinn, 4 T. B. Mon. 63.

<sup>3</sup> Bennet v. Bittle, 4 Rawle, 339. A lease of a "building" conveys the land under the eaves if owned by the lessor, and his erection of a wall there is an eviction. Sherman v. Wilkins, 113 Mass. 481. And a lease of a "store" includes the land under it and to the middle of a private way in the rear, the fee of which is in the lessor. Hooper v. Farnsworth, 128 *id.* 487. Where machinery is used on the demised premises, and lessor is to furnish power, a blast on lessor's premises connected with the machinery, will be treated as part of the leased property, and not as under a mere license. Thropp v. Field, 11 C. E. Green, 82. But adjoining buildings, though necessary and used with demised premises, do not pass unless particularly described. Ogden v. Jennings, 62 N. Y. 526.

<sup>4</sup> Parker v. Plummer, Cro. El. 190; Co. Lit. 4, 6.

pass.<sup>1</sup> And if a man, upon a lease for years, reserves a way through the house of a lessee, to a house in the rear, he can only use it at reasonable times, and upon request.<sup>2</sup> A way of necessity is also limited by the necessity which created it; and when the necessity ceases, the right of way ceases. If, therefore, at any subsequent period, the party entitled to such a way can, by passing over his own land, approach the place to which it led, by as direct a course as he would have done by using the old way, the way ceases to exist as of necessity.<sup>3</sup>

§ 163. **Certain Description not controlled. — Construction. —** Whether certain premises are parcel of and included under those demised, does not necessarily depend upon the question of boundaries, as expressed in the lease, but turns rather upon the intention of the parties, which, if ambiguous, is, as we have said, always matter of evidence.<sup>4</sup> If, however, the grant is in its terms certain, no evidence can be permitted to vary it. But it frequently happens that the parcels demised are so loosely described that unless such evidence is admitted, great inconvenience may result; if, however, they can be generally identified, it is sufficient, though all the particulars may not be true. As in a demise of certain specified meadows *containing ten acres*, which are afterwards found to contain *twenty acres*, all the meadows pass.<sup>5</sup> But where a demise is by indenture, the parties are estopped from alleging that the condition of the premises was the same as described in the lease; as, for instance, that land described as meadow was such.<sup>6</sup> So natural, visible, or artificial boundaries will prevail over specified courses and distances; since these are less certain than the former.<sup>7</sup> As in

<sup>1</sup> Manning v. Smith, 6 Conn. 289.

<sup>2</sup> Per Parke, B.; Sand v. Kingscote, 6 M. & W. 189.

<sup>3</sup> Holmes v. Goring, 2 Bing. 76; Wilson v. Bagshaw, 5 Mann. & R. 448; Osborn v. Wise, 7 C. & P. 761.

<sup>4</sup> Trimble v. Ward, 14 B. Mon. 8.

<sup>5</sup> Doe v. Burt, 1 T. R. 701; Doe v. Jersey, 3 B. & C. 870; Cary v. Thompson, 1 Dale, 35.

<sup>6</sup> Birch v. Stephenson, 3 Taunt. 469.

<sup>7</sup> Doe v. Thompson, 5 Cow. 371; Jackson v. Widger, 7 id. 723; Woods v. Kennedy, 5 T. B. Mon. 174; Mayhew v. Norton, 17 Pick. 357;

the demise of a certain tract of land on a creek, supposed to contain twenty acres more or less, then in the possession of a certain person, it was held that the lease was not limited to the twenty acres, but extended up to the creek of which the party was in possession.<sup>1</sup> But if the land is described in the instrument by reference to certain known monuments, such a description must prevail, even to the exclusion of an understanding between the parties that the lands shall be bounded by certain other monuments.<sup>2</sup> Where the quantity is mentioned, in addition to a description of the boundaries of land, without any express covenant that the land contains that quantity, the whole must be taken together and considered as mere description.<sup>3</sup>

*Massengill v. Boyle*, 4 Humphrey, 205. A grant of land bounded on tide-water, extends only to ordinary high-water mark. *Wiswall v. Hall*, 3 Paige, 313; *Gould v. H. R. R. R.*, 6 N. Y. 522. If bounded by a river where the tide does not ebb and flow, the grant extends to the middle of the stream. *Comm'rs v. Kempshall*, 26 Wend. 404; *Child v. Starr*, 4 Hill, 369. If it is described as running along the shore or the bank of the river, the grant is restricted to the margin at high water. *Storer v. Freeman*, 6 Mass. 435; *Hatch v. Dwight*, 17 *id.* 298; *Kingman v. Sparrow*, 12 Barb. 201; if, however, it be to the bank of a stream which is not navigable, the grant will extend to the thread of the stream, *Jackson v. Louw*, 12 Johns. 252, and the lessee will be entitled to the accretions caused by the stream's retreating, or by changes in its current during the term. *Cobb v. Lavalley*, 89 Ill. 331. But see *Halsey v. McCormick*, 18 N. Y. 296.

<sup>1</sup> *Hall v. Powel*, 4 S. & R. 456; *Shaw v. Clements*, 1 Call, 438; *Bustin v. Christie*, Tayl. 116; *Baker v. Seekright*, 1 Hen. & M. 177. The words *more or less* must be confined to a reasonable quantity. In one case it was held that they could not include so large an amount as thirty acres. *Day v. Flynn*, Owen, 133.

<sup>2</sup> *Clark v. Bayard*, 9 N. Y. 183; *Davis v. Rainsford*, 17 Mass. 207.

<sup>3</sup> *Powell v. Clark*, 5 Mass. 355. See *Hunt v. Campbell*, 83 Ind. 48, as cited *ante*, § 160. Where a person lets to others his *farm and farmhouse thereon*, there is no restriction as to the right of possessing all other houses on the farm; for the lease of *the farm* embraces all buildings upon the land, whether specified or not. *Hay v. Cumberland*, 25 Barb. 594. If land is conveyed by metes and bounds, and the description at its close contains an assertion of the quantity, such assertion is matter of description only, and not a covenant of quantity. *Roat v. Puff*, 3 Barb. 353; *Mann v. Pearson*, 2 Johns. 37; *Howe v. Bass*, 2 Mass. 380; *Powell v. Clark*, *supra*; *Jackson v. M'Connell*, 19 Wend. 175; *Belden v. Seymour*,

§ 164. **Description by Reference.—Parol Evidence.—Mistakes not fatal.**—If the description refers to another deed, it may be made sufficiently certain by the reference.<sup>1</sup> Or if imperfect, and yet sufficient appears to point inquiry to the true locality and boundary of the land, the deed is not void for uncertainty, but the defect may be cured by parol evidence, and identity thus given to the premises intended to be conveyed.<sup>2</sup> And where particulars are set forth, sufficiently certain to designate the thing intended to be demised, the addition of circumstances which are false or mistaken will not frustrate the deed; as if the words “with the dwelling-house thereon,” be inserted in the description, when, in fact, there is no dwelling-house on the premises, it will be considered merely a false circumstance, which does not control the rest of the description, or defeat the conveyance.<sup>3</sup> *An indorsement upon a lease*, written at the time of its signing and delivery, is deemed to be incorporated in it, and may, therefore, introduce any matter, whether of description or otherwise, tending to

8 Conn. 19; *Smith v. Dodge*, 2 N. H. 303; *Call v. Barker*, 3 Fairf. 320; *Large v. Penn*, 6 S. & R. 488.

<sup>1</sup> *Allen v. Bates*, 6 Pick. 460. Punctuation will be resorted to, in order to settle the meaning of an instrument, after all other means fail. *Ewing v. Burnet*, 11 Pet. 41.

<sup>2</sup> *Jenkins v. Bodley*, 1 Smedes & M. Ch. 338; *Seaman v. Hogeboom*, 21 Barb. 398. The general rule is that uncertainty or defects in the description of the property do not render a deed void if that result can be avoided by construction; courts will sustain it, if practicable, by reconciling or rejecting the necessary particulars. *Hull v. Foster*, 7 Vt. 100; *Wright v. Cochran*, 3 Iowa, 507; *Harvey v. Mitchell*, 31 N. H. 575; *Wing v. Burgis*, 12 Me. 111. An evident omission may be supplied by construction. *Hoffman v. Riehl*, 27 Mo. 554. A description in a lease is held not necessarily imperfect because a surveyor may be unable to locate the premises by reference to the description alone. *Coppinger v. Armstrong*, 8 Bradw. (Ill.) 210.

<sup>3</sup> *Jackson v. Clark*, 7 Johns. 217; *Jackson v. Marsh*, 6 Cow. 281. A lease of a lot describing it as number 2, but adding metes and bounds, descriptive of lot number 4, which the lessor did not own, the tenant taking possession of the former, is a good lease of number 2. *Lush v. Druse*, 4 Wend. 313. Where a mining lease provided for the lessee's mining in a lot described by metes and bounds, and after the first lot was exhausted, “in another lot adjacent,” the contract as to the last lot was held not void for uncertainty. *Iron Co. v. Stevens*, 5 Lea, 468.

qualify the provisions contained in the body of the instrument, or even to defeat it by way of condition.<sup>1</sup> Even separate instruments, executed at the same time, relating to the same subject-matter, may be construed and taken together, as different parts of the same agreement.<sup>2</sup> But a written declaration indorsed on a lease, after its execution by the lessor, that he intended to demise a greater interest than the lease expresses, is inoperative to convey any interest.<sup>3</sup> Nor will any other indorsement made upon an instrument under seal after its execution in any manner control or affect the original deed, unless such indorsement be under seal also; for a deed is incapable of modification or discharge, but by an instrument of as high a nature as itself.<sup>4</sup>

§ 165. **Fraudulent Alterations. Effect of.** — The fraudulent alteration of an instrument, after its execution and delivery, by one claiming a benefit under it, avoids it so far as respects any remedy by action upon it; and this, whether the alteration be material, or of a part quite immaterial.<sup>5</sup> But it is

<sup>1</sup> *Flint v. Brandon*, 4 B. & P. 73; *Lyburn v. Warrington*, 1 Stark. 162; *Emerson v. Murray*, 4 N. H. 171.

<sup>2</sup> *Hills v. Millar*, 3 Paige, 254; *Linsley v. Tibbals*, 40 Conn. 522.

<sup>3</sup> *Russell v. Scott*, 9 Cow. 279; *Goodright v. Mark*, 4 M. & S. 30; *Williams v. Handley*, 3 Bibb, 10.

<sup>4</sup> *Goodright v. Mark*, *supra*. A lease was extended by an agreement indorsed upon it, varying its terms; and, subsequently, after the expiration of the original term, another extension of "the within lease" was indorsed: held, that it extended the modified lease. *Cram v. Dresser*, 2 Sandf. 120.

<sup>5</sup> *Pigot's Case*, 11 Co. 266; *Master v. Miller*, 4 T. R. 820; *Boston v. Benson*, 12 Cush. 61; *Davis v. Coleman*, 7 Ired. 424; if unexplained, *Williams v. Starr*, 5 Wisc. 534; *Woodworth v. Bank of America*, 19 Johns. 391. If what is written upon or erased from the instrument does not alter its meaning or tend to mislead, it will not amount to an alteration: *Morrill v. Otis*, 12 N. H. 466; *Nichols v. Johnson*, 10 Conn. 192; unless made fraudulently: *Moye v. Herndon*, 30 Miss. 110; *Huntington v. Finch*, 3 Ohio, 445. Blanks in a sealed instrument cannot be filled in after its delivery, by another person, except by the authority of the grantor himself under seal. Co. Lit. 171; *Shep. Touch.* 54; 4 Vin. Abr. Blank.; *Com. Dig. Fait A.*, p. 1. There are, however, cases where, in the same written instruments, there are entirely disconnected obligations, or statements, wholly independent of each other; where the alteration or insertion of one, after the others have been executed, will not affect it. Such

otherwise if the alteration is made by a stranger, without the consent of the party in interest.<sup>1</sup> The application of this rule, however, does not affect the title to real estate, for neither the subsequent alteration nor destruction of a deed will divest an estate which has once become vested by a transfer of possession; although the covenants contained in such a deed may be thereby rendered void.<sup>2</sup> Yet, where an estate cannot have existence but by deed, and the deed creating the estate is fraudulently altered or destroyed by the party possessing the estate, the deed is void as to any remedy in favor of the fraudulent party, and the estate which he derived under it is also gone.<sup>3</sup> But as to an estate which may exist without writing, such as a term of years, a rent, or other incorporeal hereditament, a fraudulent alteration or cancellation will destroy the instrument, with the covenants contained in it, but not the estate; yet, as a rent-charge can only be created by deed, a fraudulent alteration of such a deed will destroy both the deed and the estate.<sup>4</sup> Where, however, a rent was created by indenture, with a counterpart, each of the parts being executed by both parties, and one was delivered to and possessed by each, and the grantee of the rent altered his deed in a material part, it was held that though a deed is essential to a rent as lying in grant, neither the remedy nor the estate of the grantee was gone, for although the alteration of the grantee's deed avoided that, yet both deeds being originals, there was a good deal in the hands of the grantor to support both the contract and the estate.<sup>5</sup>

was the case of *Doe v. Bingham*, 4 B. & A. 672; *Woolley v. Constant*, 4 Johns. 54.

<sup>1</sup> *Rees v. Overbaugh*, 6 Cow. 746; *Malin v. Malin*, 1 Wend. 625; *Nichols v. Johnson*, *supra*.

<sup>2</sup> *Woods v. Hildebrand*, 46 Mo. 284.

<sup>3</sup> *Wallace v. Harmstad*, 44 Pa. St. 492; *Wright v. Kelly*, 4 Lans. 57. The addition of a word which the law would supply is not an alteration. *Hunt v. Adams*, 6 Mass. 519.

<sup>4</sup> *Arrison v. Harmstad*, 2 Pa. St. 191. The presumption is that any material alteration, not noted in the attestation clause, has been made since execution. The party claiming under the deed must show the contrary, or otherwise explain the alteration. *Montag v. Linn*, 23 Ill. 551; *Acker v. Ledyard*, 8 Barb. 514; *Ely v. Ely*, 6 Gray, 439.

<sup>5</sup> *Lewis v. Payn*, 8 Cow. 71; *Bolton v. Carlisle*, 2 H. Bl. 259; and see



## SECTION II.

## THE EXECUTION OF A LEASE.

§ 166. **What constitutes. — Seals.** — The execution of a lease consists in its signature and delivery to the lessee, if it be a parol contract; or in its sealing and delivery, if it be by deed. We have examined the requisites of a sufficient signature to an agreement to give a lease (§ 35), and the remarks there made will be found applicable to the signature of the lease itself. When a seal is required, it must, in New York,<sup>1</sup> New Jersey,<sup>2</sup> and the New England States,<sup>3</sup> be, according to the common-law form, which is strictly an impression upon wax, wafer, or other tenacious substance capable of being impressed.<sup>4</sup> But in practice, the seal of an individual is usually a plain piece of paper, without any device, attached to the deed with a wafer; while the seal of a corporation exhibits some device to give it a distinctive character. A mere stamp on the paper upon which the instrument is written, whether made by an individual or by a corporation, without the use of wax or wafer, is insufficient;<sup>5</sup> nor will an ordinary piece

*Davidson v. Cooper*, 13 M. & W. 343. Title passes by the delivery of a lease, and will not be revested in the lessor by an alteration of the lease by the lessee. *Smith v. McGowan*, 3 Barb. 404. Held otherwise in *Bliss v. McIntyre*, 18 Vt. 466.

<sup>1</sup> *Warren v. Lynch*, 5 Johns. 239. In New York the seal of a corporation may be made by impression directly on the paper. Laws 1848, p. 305.

<sup>2</sup> *Perrine v. Cheeseman*, 6 Halst. 174.

<sup>3</sup> 4 Kent, Com. 445.

<sup>4</sup> *Beardsley v. Knight*, 4 Vt. 471. According to Lord Coke a seal is wax with an impression. Inst. 169.

<sup>5</sup> *Bank of Rochester v. Gray*, 2 Hill, 227; *Farmers' Bank v. Haight*, 3 *id.* 493. Except in New York, where the seal of a corporation or of a public officer may be stamped on the paper, without wax or wafer. Laws of 1848, p. 305. In the case of *Ross v. Bedell*, 5 Duer, 462, the learned judge expresses the opinion that an actual seal, stamped upon paper of sufficient tenacity to receive and retain the impression, is a seal in the technical sense, and within the strict definition of the common law; the case, however, seems to refer to the sealing of a commercial obligation, and not to that of an instrument for passing an estate in land. To the



of wax, without an impression upon it, suffice; for mere wax, without a character, is no seal.<sup>1</sup> In Pennsylvania, Indiana, Ohio, Wisconsin, Delaware, Florida, Michigan, Minnesota, Oregon, Missouri, Texas, Illinois, Mississippi, Georgia, and North Carolina, a mere flourish with the pen, at the end of the name, a circle of ink, or a scroll, is allowed in place of a seal, when it appears to have been intended as such.<sup>2</sup> In Virginia and Alabama, it must appear in the body of the deed that there was an intention to substitute the scroll for a seal.<sup>3</sup> In Maryland a scroll has always been considered a seal, and it need not appear that the party intended to adopt it;<sup>4</sup> while in South Carolina it is good, unless the intention to seal in a more formal manner can be presumed from the face of the instrument.<sup>5</sup> Kentucky has substituted a scroll for a wax or wafer impression, by statute.<sup>6</sup> In all the later decisions, much force is given to the attestation clause. If by this it appears that the instrument was designed to be a sealed instrument, and there is any thing affixed to it, or connected with it which, by law, may be regarded as a seal, it will, *prima facie*, be taken to be a deed; and proof of the party's signature by the subscribing witnesses, if there be such, or by any other legitimate mode, will be presumptive evidence that he sealed it.<sup>7</sup> As to the number of seals required to a deed, there appears to be no necessity for a multiplicity of them; nor that, when executed by several persons, each person shall

same effect is *Curtis v. Leavitt*, 15 N. Y. 89; *Pillow v. Roberts*, 13 How. 472. So in Massachusetts, a corporation may seal by an impression made on paper without wax. Gen. Stat. c. 3, § 7; *Hendee v. Pinkerton*, 14 Allen, 381, 388; *Roy. Bank v. Gr. Junc. R. R.*, 100 Mass. 464. But a mere printed seal not impressed on the paper is not a good corporate seal. *Bates v. Bost. & N. Y. R. R.*, 10 Allen, 251; though otherwise in Maine. *Woodman v. York & C. R. R.*, 50 Me. 549.

<sup>1</sup> *Perry v. Price*, 1 Mo. 553; 2 Bl. Com. 297; *Warren v. Lynch*, 5 Johns. 289.

<sup>2</sup> *Alexander v. Jameson*, 5 Binn. 288; *Bradfield v. McCormick*, 3 Blackf. 161; *Jones v. Logwood*, 1 Wash. 42.

<sup>3</sup> *Austin v. Whitlock*, 1 Munf. 487; *Lee v. Adkins*, 1 Minor, 187.

<sup>4</sup> *Trasher v. Everhart*, 3 Gill & J. 234; *Stabler v. Cowman*, 7 *id.* 284.

<sup>5</sup> *Ralph v. Gist*, 4 McCord, 267.

<sup>6</sup> *Bohannons v. Lewis*, 3 T. B. Mon. 376.

<sup>7</sup> *Supra*, and see *Ball v. Taylor*, 1 C. & P. 417.

have a separate seal; for several persons may bind themselves by one seal, if it appears that the seal affixed was intended to be adopted as the seal of each of the parties.<sup>1</sup>

§ 167. *Delivery, what constitutes.*—A deed takes effect so as to vest the estate or interest to be conveyed only *from its delivery* to the party himself, or to a third person, authorized to receive it.<sup>2</sup> An actual manual delivery of the instrument is not necessary, when it is understood by all parties that delivery is made. It is complete when the grantor has put it beyond his power to revoke or reclaim the instrument.<sup>3</sup> If it requires the approval of a third person to render a delivery valid, it becomes operative from the time the approval is given, although it may have been executed before.<sup>4</sup> Almost any manifestation of the party's intention to deliver, if accompanied by an act importing the same, will constitute a delivery. If the date be false or impossible, the delivery ascertains the time when the instrument is to take effect; but it will be intended to have been delivered on the day it bears date, unless the contrary is proved;<sup>5</sup> notwithstanding it was

<sup>1</sup> Mackay v. Bloodgood, 9 Johns. 285; McDill v. McDill, 1 Dall. 63; Yarborough v. Monday, 2 Dev. 493; Ball v. Dunsterville, 4 T. R. 313; Stabler v. Cowman, *supra*; Townsend v. Hubbard, 4 Hill, 351; Univ. of Vt. v. Joslyn, 21 Vt. 52. This last case determines that the intention may be drawn from the lease itself in the absence of any other evidence.

<sup>2</sup> Jackson v. Hill, 5 Wend. 532; Shep. Touch. 57; 4 Cruise, § 52. A return or redelivery of the deed to the grantor does not revest the title: Jackson v. Anderson, 4 Wend. 474; Roe v. York, 6 East. 86; Jackson v. Chase, 2 Johns. 84; Jackson v. Wood, 12 *id.* 78; and, if it has been once delivered, so as to take effect, a redelivery is of no effect, and cannot limit its operation: Verplanck v. Sterry, 12 Johns. 536; Kellogg v. Rand, 11 Paige, 59. A subsequent pledge of the deed with the grantor merely gives him an equitable lien. Jackson v. Parkhurst, 4 Wend. 209.

<sup>3</sup> Scrugham v. Wood, 15 Wend. 545; Brown v. Ansten, 35 Barb. 841; Maynard v. Maynard, 10 Mass. 456; Doe v. Knight, 5 B. & C. 671.

<sup>4</sup> Co. Lit. 36; Church v. Gilman, 15 Wend. 656; 1 R. S. 738.

<sup>5</sup> 2 Bl. Com. 307; Goodrich v. Walker, 1 Johns. Cas. 250; Trustees v. Robinson, Wright, 436. Since the Revised Statutes of New York, the presumption that a deed was delivered on the day it bears date does not prevail in respect to deeds not acknowledged or proved, and which have no subscribing witness. And such presumption never obtains where the

not acknowledged until afterwards.<sup>1</sup> There can be no delivery, however, without an acceptance, either express or implied:<sup>2</sup> but the assent of the grantee to its acceptance may be presumed from the beneficial nature of the transaction;<sup>3</sup> or where the deed is shown to have been drawn and executed at his request.<sup>4</sup>

§ 168. *Inferred from Record and other Circumstances.* — It is not essential to a valid delivery that the lessee be present, and that it be made to, or accepted by, him personally at the time of the alleged delivery; for his acceptance may be presumed from many other circumstances besides those above mentioned.<sup>5</sup> Thus, the registry of a deed, at the request of the grantor, for the use of the grantee, and the grantee's subsequent assent thereto, will be equivalent to an actual delivery of the same.<sup>6</sup> But the placing of the deed on record is only *prima facie* evidence of its delivery; and not even that, if there does not appear to have been some assent to it on the part of the grantee;<sup>7</sup> but a subsequent possession of the deed by the grantee would be evidence of its delivery to him.<sup>8</sup>

deed is proved to have been in the hands of the grantor, at a period subsequent to its date, *Elsey v. Metcalf*, 1 Den. 323, or where the certificate of acknowledgment before the subscribing witnesses is of a later date. *McIntyre v. Strong*, 48 N. Y. 127.

<sup>1</sup> *McConnell v. Brown*, Litt. Sel. Ca. 459.

<sup>2</sup> *Jackson v. Richards*, 6 Cow. 617; *Jackson v. Phipps*, 12 Johns. 421; *Shep. Touch.* 57.

<sup>3</sup> *Jackson v. Bodle*, 20 Johns. 187; *Belden v. Carter*, 4 Day, 66; *Wheelright v. Wheelright*, 2 Mass. 447; *Maynard v. Maynard*, 10 *id.* 456. Although the law will presume the acceptance of a lease, executed and delivered for the use of the lessee, if beneficial to him, yet this question is to be determined, not from the face of the instrument merely, but from the nature and circumstances of the entire transaction. *Camp v. Camp*, 5 Conn. 300. And see *Hayes v. Lawver*, 83 Ill. 292; *McFarlane v. Williams*, 107 *id.* 33; *Twombly v. Monroe*, 136 Mass. 464, where the lease appears to have been executed by the lessor for the purpose of dispossessing the tenant at will in possession.

<sup>4</sup> *Church v. Gilman*, 15 Wend. 656; *Clark v. Gordon*, 121 Mass. 330.

<sup>5</sup> *Hatch v. Hatch*, 9 Mass. 307; *Belden v. Carter*, *supra*.

<sup>6</sup> *Hedge v. Drew*, 12 Pick. 141; *Elsey v. Metcalf*, 1 Den. 323.

<sup>7</sup> *Chess v. Chess*, 1 Penn. 32; *Gilbert v. N. A. F. I. Co.* 23 Wend. 43.

<sup>8</sup> *Maynard v. Maynard*, 10 Mass. 456; *Rathbun v. Rathbun*, 6 Barb. 98.

The fact of putting a deed in the post-office, directed to the grantee, has been held to be sufficient evidence of a delivery;<sup>1</sup> but merely sending it to a third person, or depositing it in the clerk's office for record, is not sufficient, unless it is also shown to have been done for the grantee's use.<sup>2</sup> And where a registered deed, purporting to have been delivered, is lost, the presumption is that it was delivered; but this presumption will be rebutted if the original deed is produced by the grantor, or if neither the grantee nor any person on his behalf, was present at the attestation.<sup>3</sup> The non-delivery of a deed may be shown by parol evidence; and the grantee is an admissible witness for that purpose.<sup>4</sup> But its delivery cannot be proved by showing declarations of the grantor's intention to deliver prior to its delivery, and of the subsequent possession of the land by a tenant, with the assent of a grantor.<sup>5</sup> And there can be no valid delivery of a deed after the grantor's death; nor, as we have said, of one which has been executed in blank, to be filled up afterwards by the person to whom it was delivered.<sup>6</sup>

§ 169. **Delivery as an Escrow, effect of.** — A lease may also be delivered as an *escrow*, which means a conditional delivery to a stranger, to be kept by him until certain conditions shall have been performed, and then to be delivered over to the grantee. Until the condition is performed and the deed delivered, the estate does not pass, but remains in the grantor;<sup>7</sup> but when the condition has been performed, and the deed is finally delivered, it will take effect from the time of its first

<sup>1</sup> McKinney v. Rhoads, 5 Watts, 343.

<sup>2</sup> Elsey v. Metcalf, *supra*.

<sup>3</sup> Powers v. Russell, 13 Pick. 69.

<sup>4</sup> Roberts v. Jackson, 1 Wend. 478; Jackson v. Richards, 6 Cow. 617. But evidence will not be admitted to show that the delivery was in fact conditional, when it appears that the lease was executed and delivered by the lessor, upon a parol promise by the lessee that in a few days he would make out another lease to the satisfaction of the lessor. Brownell v. Haskell, 22 Pick. 310.

<sup>5</sup> Hale v. Hills, 8 Conn. 39.

<sup>6</sup> See *ante*, § 146; Jackson v. Leek, 12 Wend. 105.

<sup>7</sup> Green v. Putnam, 1 Barb. 500; Jackson v. Richards, 6 Cow. 619.

delivery ;<sup>1</sup> notwithstanding one of the parties may have died before the condition has been performed.<sup>2</sup> And if it be duly delivered in the first instance, it will operate, although the grantee afterwards suffers it to remain in the custody of the grantor.<sup>3</sup> But there cannot be a delivery to the grantee himself as an *escrow*, to take effect upon the performance of a condition not expressed in the deed ; and if so delivered, it will at once become absolute in law.<sup>4</sup> It will not, however, take effect as an operative interest, although left in the hands of the grantee, if it was only left for the purpose of being sent to a third person to remain in *escrow*.<sup>5</sup> Neither can it be delivered to a third person to be kept during the pleasure of the parties, and made subject to their further order : such a delivery is not an *escrow*, but a mere deposit.<sup>6</sup> And a deed actually delivered by an agent to one for whom it is made is no longer an *escrow*, though placed in the hands of such agent under an agreement that it should be considered an *escrow*.<sup>7</sup> But a deed delivered as an *escrow* will not take effect until the condition is performed, except where the operation of the conveyance would be absolutely defeated, unless the first delivery should be permitted to have an effect.<sup>8</sup>

§ 170. *Witnesses.* — The execution of a *lease by parol* is complete without a witness ; but when the lease is by deed,

<sup>1</sup> *Ruggles v. Lawson*, 13 Johns. 285; *Jackson v. Catlin*, 2 Johns. 248; *Bushell v. Pasmore*, 6 Mod. 217; 8 Prest. Abstr. 104.

<sup>2</sup> *Hunter v. Hunter*, 17 Barb. 25, 82; *Shep. Touch.* 59.

<sup>3</sup> *Souverbye v. Arden*, 1 Johns. Ch. 240; *Doe v. Knight*, 5 B. & C. 671. Where the deed of A. and the note of B. were deposited by them with C. to be delivered in exchange when both parties should direct, it was held to be a delivery in *escrow*. It is not necessary that the term *escrow* should be used when a delivery is made to a third person, in order to prevent its being absolute; the intent of the parties will prevail. *Clark v. Gifford*, 10 Wend. 310.

<sup>4</sup> *Arnold v. Patrick*, 6 Paige, 310; *Worrall v. Mumm*, 5 N. Y. 229; *Lawton v. Sager*, 11 Barb. 349. A deed delivered to the grantee is not held as an *escrow*; such delivery either takes effect absolutely, or it is void and works nothing. *Braman v. Bingham*, 26 N. Y. 483.

<sup>5</sup> *Gilbert v. N. A. Ins. Co.*, *supra*.

<sup>6</sup> *James v. Vanderheyden*, 1 Paige, 385.

<sup>7</sup> *Simonton's Estate*, 4 Watts, 180.

<sup>8</sup> *Jackson v. Rowland*, 6 Wend. 666.

two witnesses are required for its valid execution, in New Hampshire, Vermont, Rhode Island, Connecticut, Ohio, Georgia, Illinois, Kentucky, and Indiana. In Delaware, Tennessee, Mississippi, Maryland, and South Carolina, two witnesses are necessary where the deed is to be proved by witnesses. But by the common law which prevails in Pennsylvania, Massachusetts, and Kentucky, as well as in New York, no attesting witness is necessary to the validity of a deed.<sup>1</sup> In New York, proof of its execution, made by one witness, or its acknowledgment by the party before the proper officer without a witness is sufficient to entitle it to be recorded.<sup>2</sup> Formerly a proper revenue stamp was also necessary, and if omitted at the time of execution with intent to defraud, the lease was invalid.<sup>3</sup> Where several parties join in one agreement, only one stamp is necessary.<sup>4</sup> And if a material alteration is made in a lease after it has become an available document, or in an agreement for a lease which has been already stamped, it must be restamped.<sup>5</sup>

§ 171. *Record, effect of.*—The statute laws of every State in the Union require also that all transfers of land, including

<sup>1</sup> 4 Kent, Com. 449 ; *Wicks v. Caulk*, 5 Har. & J. 86 ; *Long v. Ramsey*, 1 S. & R. 72 ; *Sicard v. Davis*, 6 Pet. 124.

<sup>2</sup> 1 N. Y. R. S. 738, § 187. "Every grant of a freehold estate shall be subscribed and sealed by the person from whom the estate is intended to pass, &c. ; and, if not duly acknowledged previous to its delivery, its execution and delivery shall be attested by at least one witness, or, if not so attested, it shall not take effect as against a subsequent purchaser or incumbrancer, until so acknowledged." A deed without any witness or acknowledgment is good as against the grantor. See 2 Bl. Com. 296 ; *Champl. & St. L. R. R. v. Valentina*, 19 Barb. 484.

<sup>3</sup> *Holyoke Machine Co. v. Franklin Paper Co.*, 97 Mass. 150 ; *Vorebeck v. Roe*, 50 Barb. 802 ; *Blunt v. Bates*, 40 Ala. 470, 475. But this provision has been held operative and applicable only in the United States courts, — *Carpenter v. Snelling*, 97 Mass. 452 ; *Lynch v. Morse*, *id.* 458, — and is now abolished in this country by act of 1872. Under the English Stamp Act, an unstamped lease is not on that account invalid ; but it cannot be read in evidence if required to be produced in court. *Buxton v. Cornish*, 12 M. & W. 426.

<sup>4</sup> *Davis v. Williams*, 13 East, 282.

<sup>5</sup> *Reed v. Deere*, 7 B. & C. 261.

leases, except certain minor chattel interests, shall, in order to secure the priority to which they may be entitled, *be recorded* in the county in which the premises are situated, after being first *acknowledged or proved*; and, if not so recorded, they are void as against any subsequent incumbrancer or purchaser of the same premises, in good faith, and for a valuable consideration, whose conveyance shall be first duly recorded.<sup>1</sup> Actual notice of a conveyance, however, is equivalent to the record of it.<sup>2</sup> And there is nothing in any of the statutes to invalidate a lease which has not been recorded, as between the parties themselves. The statutes were intended to protect *bond fide* purchasers of property against secret or fraudulent conveyances, but they give this protection only to such persons as will record their conveyances, and thus warn others

<sup>1</sup> Thus in New York, all conveyances of land including leases of three years and upwards, must be recorded. 1 R. S. 762, § 38. In Massachusetts, leases of seven years and upwards, Gen. Stat. c. 89, §§ 1 & 3. In Maryland an unrecorded lease of more than seven years is held to be void. *Anderson v. Critcher*, 11 Gill & J. 450. In Vermont a lease of lands for more than one year when not acknowledged or recorded is ineffectual to hold such lands against any but the grantor and his heirs. G. S. c. 65, § 7. *Buswell v. Marshall*, 51 Vt. 87. Where a lease for a term of years has been duly recorded it has priority over a mortgage in the hands of an assignee and executed subsequent to the recording of the lease; although the assignment was made after a decree of foreclosure. *Enos v. Cook*, 65 Cal. 175.

<sup>2</sup> *Tuttle v. Jackson*, 6 Wend. 213; *State of Conn. v. Bradish*, 14 Mass. 296; *Porter v. Cole*, 4 Greenl. 20; *Tart v. Crawford*, 1 McCord, 265; *West v. Randall*, 2 Mason, 206; *Colby v. Kenniston*, 4 N. H. 262; *Weaver v. Coumbe*, 15 Neb. 167; *Jackson v. Winslow*, 9 Cow. 13; *Jackson v. Phillips*, *id.* 94; *Jackson v. Post*, *id.* 120. In Pennsylvania, leases for less than twenty-one years where the actual possession and occupation go along with the lease are excepted from the operation of the recording acts. *Marsh v. Nelson*, 101 Pa. St. 51. That a judgment creditor is not a purchaser within the purview of the statute, see *Den v. Richman*, 1 Green, 55. In New York, the term "purchaser" is construed to embrace every person to whom any interest in real estate is conveyed for a valuable consideration, including every assignee of a lease or mortgage. 2 R. S. 762, § 37. The rule which makes unrecorded leases binding upon the parties is applied to leases which want the acknowledgment, *Johnson v. Phoenix Mut. L. Ins. Co.*, 46 Conn. 92, and to assignments of leases. *Stillman v. Harvey*, 47 *id.* 26.

from taking a subsequent conveyance of property which has already been conveyed to them.<sup>1</sup>

<sup>1</sup> *Jackson v. Post, supra*; *Jackson v. West*, 10 Johns. 466. In some of the States a period is allowed within which deeds must be recorded; and, according to Chancellor Kent, 4 Com. 457, a year is allowed in Delaware, Tennessee, Georgia, and Indiana; eight months in Virginia; six months in Pennsylvania, Maryland, North and South Carolina, Alabama, Illinois, and Ohio; three months in Missouri and Mississippi; and fifteen days in New Jersey.



## CHAPTER VI.

OF RIGHTS AND LIABILITIES GENERALLY INCIDENT TO A  
TENANCY.

§ 172. **Reciprocal Rights and Duties of the Parties, generally.** Before proceeding to examine the particular rights and liabilities of the respective parties to a demise, it may be found neither impertinent nor unprofitable to consider some of those obligations of a general character which are necessarily incident to the relation of landlord and tenant, but which do not usually fall within the scope of the covenants which the parties employ for the purpose of defining their respective rights and duties. Upon the making of a lease, rights and liabilities attach to each of the parties, not only in respect to each other, but also in regard to other persons who are strangers to the contract. The landlord retains certain rights over the property, although he has parted with his possession; while the tenant assumes corresponding obligations as soon as he is clothed with that character. By virtue of his right of exclusive occupation, a tenant becomes entitled to use the premises, in the same manner as the owner might have done, except that he must do no act to the injury of the inheritance.<sup>1</sup> He may be bound to support and repair bridges, roads, division fences, and party-walls. He is obliged to make good any damage that may be occasioned by his neglect to keep the premises in a safe condition, or to use them in a reasonable and prudent manner. His possessory interest will enable him to defend himself against all trespassers upon the premises, as well as against a disturbance, nuisance, or other offensive erection so near his dwelling as to render it useless or unfit for habitation.<sup>2</sup>

<sup>1</sup> Jackson *v.* Brownson, 7 Johns. 227, 234; Bradstreet *v.* Pratt, 17 Wend. 44; Livingston *v.* Reynolds, 2 Hill, 157.

<sup>2</sup> Willard *v.* Tillman, 2 Hill, 274; Moffat *v.* Smith, 4 N. Y. 126; Day *v.* Swackhamer, 2 Hilt. 4; Texas & Pac. R. R. *v.* Bayliss, 62 Tex. 570.

If there are ways, commons, fisheries, or other privileges or easements attached to the estate, they must be used in such a reasonable manner as not to infringe upon the rights of others who are equally entitled to the enjoyment of them with himself. And supposing him to have a right to remove buildings, or to mine and dig the soil, he is not to do so without considering what effect such operations will produce upon the house or land of his neighbor. We propose cursorily to examine each of these rights and duties in their order.

## SECTION I.

### ON THE PART OF THE LANDLORD.

§ 173. **May protect his Reversionary Rights, and how.** — After the making of a contract of lease, the right of possession in legal contemplation remains in the lessor, until the time has arrived when the contract is to be consummated by the entry of the lessee. After that period, the right of possession is changed, and the tenant is in a position to enforce this right by an action of ejectment;<sup>1</sup> and, after entry, to bring actions for injuries to his possession. The landlord's rights, after the tenant's entry, are confined to the protection of his reversionary interest merely, — that is, to the maintenance of actions for such injuries as would, in the ordinary course of things, continue to affect such interest after the determination of the lease; whether the injury be committed by a tenant, an under-tenant, or a stranger, and whether the term shall have expired or not;<sup>2</sup> and that notwithstanding he may not have an

<sup>1</sup> But the possession of the tenant is for many purposes that of the landlord. *Vanduyner v. Heffner*, 45 Ind. 589.

<sup>2</sup> *Starr v. Jackson*, 11 Mass. 519; *French v. Fuller*, 28 Pick. 104; *Jackson v. Pesked*, 1 M. & S. 234; *Jesser v. Gifford*, 4 Burr. 2141; *Baxter v. Taylor*, 4 B. & Ad. 72; *Bower v. Hill*, 1 Bing. (N. C.) 555; *Little v. Pallister*, 3 Greenl. 6; *Austin v. Huds. Riv. R. R.*, 25 N. Y. 334; *Geer v. Fleming*, 110 Mass. 89; *Aycock v. Railroad*, 89 N. C. 821; *Mayor v. Lyon*, 69 Ga. 577. It seems that at common law the landlord had the right to come in and defend an action of ejectment against the tenant. *Sutton v. Casselegi*, 77 Mo. 897; *Jackson v. Allen*, 30 Ark. 110; *Bryant*

immediate interest in the estate at the time of commencing the action, as if there be an intervening estate for life or for years.<sup>1</sup> Of such actions are those for breaking the windows of a house; stopping up a rivulet, whereby the timber on the estate becomes rotten;<sup>2</sup> the erection of an unwholesome nuisance near the premises;<sup>3</sup> undermining the foundations of a house;<sup>4</sup> or for not sustaining a sea-wall, whereby the property was injured; cutting down trees, and the like.<sup>5</sup> He may also by injunction restrain the commission of such injurious acts; or prevent a lessee from converting the premises to uses that are inconsistent with the terms of the lease, from making material alterations in the buildings, or committing other species of waste.<sup>6</sup> But the injury complained of must be of such a character as permanently to affect the inheritance;<sup>7</sup> and a mere disturbance, if not of a continuous nature, even though done in the assertion of a right, will not entitle the reversioner to an action.<sup>8</sup> Yet, if any one interferes with

*v. Kinlaw*, 90 N. C. 337; and see *Wissenhunt v. Jones*, 78 *id.* 361; *Same v. Same*, 80 *id.* 348; *Maddrey v. Long*, 86 *id.* 383. In such an action, if the landlord assumes the defence he is bound, thereafter, by the judgment, *McCreery v. Everding*, 54 Cal. 168, when it appears that the subject matter, formerly, was the same, and that the case was submitted and decided on its merits. *Altschul v. Polack*, 55 *id.* 633.

<sup>1</sup> *Robinson v. Wheeler*, 25 N. Y. 252; *Van Dusen v. Young*, 29 Barb. 9.

<sup>2</sup> *Bedingford v. Onslow*, Lev. 3, 209; *Ray v. Ayers*, 5 Duer, 494; *Anderson v. Dickie*, 26 How. Pr. R. 105; and though the tenant has a privilege of buying, the insurance money is the landlord's until the option is exercised. *Gilbert v. Post*, 28 Ohio St. 276.

<sup>3</sup> It is held that if the tenant uses the premises in such a manner as to create a nuisance, the landlord has a right to abate it. *Kurrus v. Seibert*, 11 Bradw. (Ill.) 319; but see § 174 *post*.

<sup>4</sup> *Barrow v. Richards*, 8 Paige, 351; *Reynolds v. Clarke*, 2 Ld. Ray. 1399; *Smith v. Martin*, 2 Saund. 397.

<sup>5</sup> *Taylor v. Cole*, 3 T. R. 292; *Dodd v. Hohne*, 1 Ad. & E. 493; and see *post*, § 775, &c.

<sup>6</sup> *Kane v. Vanderburg*, 1 Johns. Ch. 11; *Douglas v. Wiggins*, 1 *id.* 435; *Sarles v. Sarles*, 3 Sandf. Ch. 601; *Grey de Wilton v. Saxton*, 6 Ves. 106. And see *post*, § 693. The sub-lessee may be restrained without making the lessee a party. *Maddox v. White*, 4 Md. 72.

<sup>7</sup> *Queen's Coll. v. Hallett*, 14 East, 489; *Otto v. Grice*, 4 Dev. 477.

<sup>8</sup> *Baxter v. Taylor*, 4 B. & Ad. 72. A reversion is an estate which remains in the grantor and his heirs, and which is to take effect in pos-

his tenants so far as to disturb their enjoyment, and thereby cause a loss of rent or other damage,<sup>1</sup> the landlord may have an action; and, if the disturbance is continued, he may, from time to time, bring a fresh action.<sup>2</sup> If a stranger enters upon the premises and cuts down trees, the landlord, immediately upon the severance, acquires such a right of possession as will enable him to recover them in an action of trover.<sup>3</sup> But he may not bring an action of *trespass* for an injury to the land while there is a tenant for years lawfully in possession; for the ground of such an action is injury to the immediate possession, and the plaintiff must have been in either the actual or constructive possession when the trespass was committed.<sup>4</sup>

§ 174. **Right to enter Premises strictly a Reserved Right.—Its Incidents.**—The landlord generally retains the right to go upon the premises, for the purpose of examining what waste or injury, if any, has been committed by the tenant or other person, first giving notice of his intention to do so; but strictly he would have no such right unless he reserves it in the lease, for every unauthorized entry upon land, whether an injury be thereby inflicted or not, amounts to a trespass.<sup>5</sup> He

session upon the determination by its own limitation of an outstanding particular estate. A right to enter and resume the possession for a breach of a condition is not a reversion. *Phenix v. Com'rs of Emigration*, 12 How. Pr. R. 1; 1 N. Y. R. S. 723, § 12. So see *ante*, § 16, and n.

<sup>1</sup> *Aldridge v. Stuyvesant*, 1 Hall, 214.

<sup>2</sup> *Shadwell v. Hutchinson*, 2 B. & Ad. 97.

<sup>3</sup> *Bewick v. Whitfield*, 3 P. Wms. 267; *Berry v. Heard*, Cro. Car. 242; *Schermerhorn v. Buell*, 4 Den. 422.

<sup>4</sup> *Campbell v. Arnold*, 1 Johns. 511; *Tobey v. Webster*, 3 *id.* 468; *Catlin v. Hayden*, 1 Vt. 375; *Robertson v. George*, 7 N. H. 306; *Gould v. Sternberg*, 4 Bradw. (Ill.) 439. So not where a tenant from year to year, or a tenant at will, is in possession: *French v. Fuller*, 23 Pick. 104; though otherwise, if the tenancy is strictly at will or at sufferance. The technical action of trespass is here intended, in contradistinction to the actions of trespass on the case before referred to. See *post*, § 764.

<sup>5</sup> *Heermance v. Vernoy*, 6 Johns. 5; *Blake v. Jerome*, 14 Johns. 406; *Dixon v. Clow*, 24 Wend. 188; *Parker v. Griswold*, 17 Conn. 288; *Shannon v. Burr*, 1 Hilt. 89; *State v. Piper*, 89 N. C. 551. A landlord's entry upon the possession of his tenant whose lease depends upon conditions

may use all *ways* appurtenant to the premises for the purpose of demanding rent, making such repairs as are necessary to prevent the waste of the premises, or for removing an obstruction.<sup>1</sup> But where the rent is payable in hay or other produce, to be delivered from the farm to the landlord, he is not authorized to go upon the land and take the hay, until it is delivered to him by the tenant, or has been severed, and set apart for his use.<sup>2</sup> If, however, by the terms of the lease, he has reserved the right to enter and make repairs, he is not liable for any damages resulting from its exercise, unless the work has been performed in a wanton, unskilful, or negligent manner.<sup>3</sup> And we may here notice that, where the statute requires the consent of the owner, his reversionary interest cannot be subjected to a mechanic's lien for work done in

which have not been violated is a trespass. *McGee v. Gibson*, 2 Ky. 353. A covenant for a landlord to be allowed to come into a house to see the state of the repairs at convenient times is not broken by his not being allowed to go into some of the rooms, if he has given no notice of his coming. *Doe v. Bird*, 6 C. & P. 195. A covenant that the landlord may enter in certain months to make repairs is broken by his entry at other times, and the fact that repairs are necessary will not justify such an entry. *Goebel v. Hough*, 26 Minn. 252.

The tenant may have damages from his landlord by reason of the careless destruction by the latter of the leased property; as by fire, although the lease allows the landlord one half the pasturage on the leased premises. *Teagarden v. McLaughlin*, 86 Ind. 476.

<sup>1</sup> *Proud v. Hollis*, 1 B. & C. 8; *Penley v. Watts*, 7 M. & W. 601; *Shaw v. Cumiskey*, 7 Pick. 76; *Petersen v. Edmonsens*, 5 Harr. 378. In England it has been held that an immediate lessee may recover, as special damages, from an under-lessee who holds under similar covenants, the costs of defending an action, as well as the damages under it, brought by the original lessor for want of repairs; because, during the term of the under-lessee, he could not have entered for the purpose of repairing without making himself a trespasser. *Neale v. Wyllie*, 3 B. & C. 583; *Barker v. Barker*, 3 C. & P. 557. But this doctrine has been overruled in *Penley v. Watts*, 7 M. & W. 601, and *Walker v. Hatton*, 10 *id.* 249. The question of liability for damages in cases of this kind, probably depends upon the character of the trespass, as to whether it was merely trivial, and so *absque injuria*, or whether it was wholly unwarranted.

<sup>2</sup> *Dockham v. Parker*, 9 Greenl. 137; *Woodruff v. Adams*, 5 Blackf. 817.

<sup>3</sup> *Turner v. McCarthy*, 4 E. D. Smith, 247; *White v. Mealis*, 5 Jones & S. 72.

altering or repairing the demised premises by order of the tenant, if he merely stood by and observed the progress of the work.<sup>1</sup>

§ 175. **Liability to Strangers for Injuries, what.** — The landlord's liabilities, in respect of possession, are in general suspended as soon as the tenant commences his occupation.<sup>2</sup> But where injuries result to a third person from the faulty or defective construction of the premises,<sup>3</sup> or from their ruinous

<sup>1</sup> *Francis v. Sayles*, 101 Mass. 435; *Conant v. Brackett*, 112 *id.* 18; *McClintock v. Criswell*, 67 Pa. St. 183. This lien is a creature of the statute, and, of course, varies in the different States. But the right to a lien arising under a contract made with a builder, attaches upon the property of the party contracting only to the extent of his interest therein. Whether it might not lie against the lessee's interest, *quære*. *Ombony v. Jones*, 19 N. Y. 234; *Ernst v. Reed*, 49 Barb. 367; *Smith v. Covey*, 3 E. D. Smith, 642; *Doughty v. Devlin*, 1 *id.* 625.

<sup>2</sup> *Cheetham v. Hampson*, 4 T. R. 318; *Eakin v. Brown*, 1 E. D. Smith, 36; *Mayor v. Corlies*, 2 Sandf. 301; *St. Louis v. Kaime*, 2 St. Lo. Mo. App. 66, *Cleveland Coöp. Stove Co. v. Wheeler*, 14 Bradw. (Ill.) 112; *Shindelbeck v. Moon*, 32 Ohio St. 264. The analogy is direct to the rule which holds the owner of real estate free from liability for injuries caused by the employees of a contractor to build upon the premises. In each case the control is parted with. *Hilliard v. Richardson*, 3 Gray, 349; *Meany v. Abbott*, 6 Phila. 256; *Blake v. Ferris*, 5 N. Y. 48. So the control retained by a municipal corporation of its streets renders it liable for defects caused by private persons. *Reinhard v. Mayor*, 2 Daly, 243; *Davenport v. Ruckman*, 10 Bosw. 20; 37 N. Y. 568. A statute provision that the "owner" of a factory shall provide fire escapes is held not to apply to the owner in fee not in possession, but to the tenant in possession occupying the premises as a factory, — the word "factory" being construed to include machinery, engines, and power, owned by, and in the control of, the tenant, who places the operatives in a position of danger from such machinery, &c., and benefits from their services. *Schott v. Harvey*, 105 Pa. St. 222; *Keely v. O'Conner*, 106 *id.* 321; *Lee v. Smith*, 42 Ohio St. 458.

<sup>3</sup> *King v. Pedley*, 1 Ad. & E. 827; *Pickard v. Collins*, 23 Barb. 444; *Scott v. Simons*, 54 N. H. 426; *Durant v. Palmer*, 5 Dutch. 544; *Swords v. Edgar*, 59 N. Y. 28; *Wenzler v. McCotter*, 22 Hun, 60; *Larue v. F. Hotel Co.*, 116 Mass. 67; *Learoyd v. Godfrey*, 138 *id.* 315. A similar view is taken in New York of structures in or under the public highway, *infra*, p. 194, note 2. The civil liability attaches although the landlord is a lunatic. *Morain v. Devlin*, 132 Mass. 87.

condition at the time of demise,<sup>1</sup> or because they then contain a nuisance, even if this only becomes active by the tenant's ordinary use of the premises;<sup>2</sup> the landlord is still liable notwithstanding the lease. So where the landlord knowingly demises the tenement for a purpose for which it is unfit, he has been held liable to strangers for injury suffered by them while it is so used.<sup>3</sup> And if he holds or resumes control of

<sup>1</sup> *Bellows v. Sackett*, 15 Barb. 96; *Todd v. Flight*, 9 C. B. n. s. 377; *Moody v. Mayor*, 43 Barb. 482; *Peoria v. Simpson*, 110 Ill. 294; *Reichenbacher v. Pahmeyer*, 8 Bradw. (Ill.) 217; *Marshall v. Heard*, 59 Tex. 266. *Eakin v. Brown*, *supra*; *Nelson v. Liv. Brew. Co.*, 2 L. R. C. P. Div. 311.

<sup>2</sup> *Fish v. Dodge*, 4 Denio, 311; *House v. Metcalf*, 27 Conn. 631. In this case the owner of a mill was held for injuries to plaintiff by his horse becoming frightened by the sails of the mill, though at some distance from the highway, and worked by a tenant. The lessor's liability is put on the ground of principal and agent. On like ground, the landlord is held liable for the acts of his tenant in polluting the waters of a natural water-course running through the premises by discharging sink water therein, if the leased building is adapted to be used in the manner complained of. *Jackman v. Arlington Mills*, 137 Mass. 277. So *Owings v. Jones*, 9 Md. 108. And here, and in some cases in New York, a coal shoot or other excavation beneath or at the public highway, has been considered an incipient nuisance *per se*: *Congreve v. Smith*, 18 N. Y. 79; *Whalen v. Gloster*, 4 Hun, 24; *Irvine v. Wood*, 51 N. Y. 224; and *Stratton v. Staples*, 59 Me. 94, may have proceeded on this ground. In *Swords v. Edgar*, *supra*, a similar liability seems to have attached to the ownership of a wharf, from its *quasi* public character. But in *Ditchett v. S. D. R. R.* 67 N. Y. 425, a different view was taken, and a railroad company lessor was held not to be responsible for the condition of the fences at a public highway crossing, if these were in good condition when demised; and no such implication appears to exist in the other States or in England.

As between landlord and tenant, the party presumptively liable for a nuisance upon the leased premises is the tenant. Per Cooley, J., *Samuelson v. Cleveland Iron Min. Co.*, 49 Mich. 164.

<sup>3</sup> *Godley v. Haggerty*, 20 Pa. St. 387; *Carson v. Godley*, 26 *id.* 111. "The wrong consisted not in erecting walls incapable of standing alone, but in building and renting a store for a specific purpose for which it was unfit" (p. 120). So *Helwig v. Jordan*, 53 Ind. 201; *Pickard v. Collins*, *Owings v. Jones*, and *Swords v. Edgar*, *supra*. In New York, the court, after laying down the rule that the landlord, unless he has wilfully concealed the defective condition of the demised premises, is not liable for injury resulting to third persons going upon them during the term, have



the premises pending the lease,<sup>1</sup> or renews the lease, or grants another lease while the nuisance continues, he becomes liable for their condition thereafter.<sup>2</sup> And where he has covenanted to repair, and the injury arises from this want of repair, although the occupant is in the first instance liable,<sup>3</sup> the landlord may be sued at once to avoid circuitry of action.<sup>4</sup> Again, while a landlord is not, as such, bound to repair, yet if he assumes to do so, and neglects to perform his obligation, or in performing it, if an injury is caused from want of skill in, or proper selection of, his workmen, he is held therefor.<sup>5</sup> But to render

extended the rule to the case of structures erected to be used for a public purpose, as a public amphitheatre built for equestrian or pedestrian exhibitions. (Ruger, C. J., Danforth & Finch, JJ., dissenting) *Edwards v. N. Y. & H. R. R. Co.*, 98 N. Y., 245, s. c. below, 25 Hun, 634; *Bard v. Same*, 10 Daly, 520.

<sup>1</sup> *Cannavan v. Conkling*, 1 Daly, 509; *Leslie v. Pound*, 4 Taunt. 649. Where an elevator on the leased premises run by the lessee's servant was to be kept in repair by the lessor, it was held that the lessee was not in such possession or control of the elevator as to be responsible for an accident to a third person resulting from a defect in its construction. *Sinton v. Butler*, 40 Ohio St. 158.

<sup>2</sup> *Rosewell v. Prior*, 2 Salk. 460; *King v. Pedley*, *supra*; *Vedder v. Vedder*, 1 Den. 257; *Whalen v. Gloster*, 4 Hun, 24; *Waggoner v. Germaine*, 3 Den. 306. Here the owner's grant of land having a dam so high as when filled to flow the neighbor's land, with a warranty, subjected grantor to liability for the damage caused by using the dam to its full height. In *Gandy v. Jubber*, 5 B. & S. 73, the court held the lessor from year to year, because each year was a reletting. But see s. c. *id.* 485. Both lessor and lessee may be sued at once: *Plumer v. Harper*, 3 N. H. 88; *Staple v. Spring*, 10 Mass. 72; *Brown v. Woodworth*, 5 Barb. 550; *Rogers v. Smith*, 5 Vt. 215; *Irvine v. Wood*, 51 N. Y. 224; and plaintiff may have judgment for damages, or removal, or both: *Hutchins v. Smith*, 63 Barb. 251. So the assignee of the reversion may be held: *King v. Pedley*, *supra*; and by any subsequent occupant injured: *Staples v. Spring*, *supra*.

<sup>3</sup> *Regina v. Watts*, 1 Salk. 357; *Russell v. Shenton*, 3 Q. B. 449; and see *post*, § 178, note, and cases cited.

<sup>4</sup> *Payne v. Rogers*, 2 H. Bla. 350; *Milford v. Holbrook*, 9 Allen, 17; *Durant v. Palmer*, 5 Dutch. 544, 546; *Benson v. Suarez*, 43 Barb. 408; *Fisher v. Thirkell*, 21 Mich. 1; *Gridley v. Bloomington*, 67 Ill. 47; *Nelson v. Liv. Brew. Co.*, 2 L. R. C. P. Div. 311.

<sup>5</sup> *Leslie v. Pounds*, 4 Taunt. 649; *Payne v. Rogers*, *Benson v. Suarez*, *supra*; *Gill v. Middleton*, 105 Mass. 477; *Glickauf v. Maurer*, 75 Ill. 289.



him liable the nuisance must be one that necessarily arises from the tenant's ordinary use of the premises for the purpose for which they were let, and not be avoidable by reasonable care on the tenant's part.<sup>1</sup> If it is produced only by the act of the tenant, he alone is responsible.<sup>2</sup> So if the condition of the premises is not radically defective or wholly ruinous, and the repair falls within the tenant's duty, express or implied, the landlord is not liable for the neglect.<sup>3</sup>

<sup>1</sup> *Fish v. Dodge*, *King v. Pedley*, *supra*. In *Rich v. Basterfield*, 4 C. B. 783, the doctrine of *King v. Pedley* is severely criticised. Here a chimney in the demised tenement was so constructed that a coal fire produced a nuisance. It was held that the tenant was bound to abstain from using coal, and that the lessor was not liable if the lessee used it. But this is of questionable soundness. In *Gandy v. Jubber*, *supra*, a more correct rule is laid down. "To render the landlord liable, the nuisance must be, if I may so term it, a *normal* one; not such, for instance, as a cellar with a flap, which may or may not be a nuisance, according as it is carefully closed or improperly left open." Blackburn, J. And this seems the result of authority. *Fisher v. Thirrell*, *supra*; *Leonard v. Storer*, 115 Mass. 86; *Taylor v. Bailey*, 74 Ill. 178. *McCarthy v. York Co. Savings Bank*, 74 Me. 315; *Allen v. Smith*, 76 *id.* 335.

<sup>2</sup> *Saltonstall v. Banker*, 8 Gray, 195; *Owings v. Jones*, *supra*; *Taylor v. Mayor*, 4 E. D. Smith, 559; *Fisher v. Thirkell*, *supra*; *Ditchett v. S. D. R. R.*, 67 N. Y. 425; *Ryan v. Wilson*, 87 *id.* 471; s. c. below, 63 How. Pr. 172; *Norton v. Wiswall*, 26 Barb. 618; *Heimstreet v. Howland*, 5 Denio, 68; *Felton v. Deall*, 22 Vt. 170; *Mahoney v. Atl. & S. L. R. R.*, 63 Me. 68; *Harris v. Cohen*, 50 Mich. 324. So one having the care and custody of cattle, as lessee of a farm and the stock thereon, is under the same liability for damage done by the cattle as if he were the owner. *Moulton v. Moore*, 56 Vt. 700. So the tenant alone is liable for injury to adjacent property occasioned by his setting fires on the leased premises against the landlord's direction. *Ferguson v. Hubbell*, 26 Hun, 250.

<sup>3</sup> *Mayor v. Corlies*, 2 Sandf. 301; *Radway v. Briggs*, 37 N. Y. 256; *Odell v. Solomon*, 50 N. Y., S. C. 119; *Leonard v. Storer*, 115 Mass. 86; *St. Louis v. Kaime*, 2 Mo. App. 66; *Deutsch v. Abeles*, 15 *id.* 398; *Gridley v. Bloomington*, 67 Ill. 47; *Union Brass Mfg. Co. v. Lindsay*, 10 Bradw. (Ill.) 583; *Bishop v. Bedf. Ch.*, 1 Ellis & E. 697. Upon like ground it was held in *Mellen v. Morrill*, 126 Mass. 545, that the landlord was not liable to a third person who, in passing along a walk leading from the street to the leased building, to transact business with the tenant, received injuries by reason of a defect in the walk, although the defect existed prior to the letting. But where the defect existed in a way leading to several tenements leased to different tenants and used in common by the tenants and the public, the landlord was held liable for result-

§ 175 *a*. **Liability to Tenant for Injuries.**—The lessor's liability to the lessee is, however, much more restricted. As the former does not warrant the condition of the premises, and the tenant, because he can inspect them, assumes the risk of their state;<sup>1</sup> for any injury suffered by him during his occupancy by their defective condition, or even faulty construction, he cannot make the lessor answerable,<sup>2</sup> unless there was misrepresentation, active concealment,<sup>3</sup> or perhaps a total inability on the tenant's part to discover the defect before

ing injuries to third persons in the absence of an agreement by the tenants to keep the way in repair. *Readman v. Conway*, 126 Mass. 374. As to the landlord's liability to third persons for injuries resulting from a defect in a common stairway leading to rooms in a building leased to different tenants, see *Murr. v. Henkel*, 31 Hun, 28. The mere license of the landlord to the tenants of a house to enjoy in common the use of a part of the premises imposes no liability on the landlord for injuries resulting to a tenant from a defect in the part so used. *Ivay v. Hedges*, 9 Q. B. D. 80. In *Congreve v. Smith*, and other cases cited, *ante*, n. 4, making a structure or excavation, at or under the highway, was regarded as imposing a continuous responsibility on the owner, notwithstanding a lease, to keep it always safe. But in *Pretty v. Bickmore*, L. R. 8 C. P. 405; *Gwinnell v. Eames*, 10 *id.* 658, this was held otherwise, and the lessor not responsible for a broken flap over a coal shoot, even if broken when demised, if he was not aware of its condition. So see *Fisher v. Thirkell*, *Leonard v. Storer*, *supra*, *ad idem*. In *Buesching v. St. Louis Gas L. Co.* 73 Mo. 219, the landlord and tenant were held equally liable for injuries to a third person caused by an excavation at the street level.

<sup>1</sup> *Post*, §§ 327, 328, 382.

<sup>2</sup> *Brewster v. Defremery*, 33 Cal. 341; *Sherwood v. Scallan*, 2 Bosw. 127; *Doupè v. Genin*, 1 Sweeny, 25; 45 N. Y. 119; *Joyce v. De Giverville*, 2 Mo. App. 596; *Hazlett v. Powell*, 30 Pa. St. 293; *Jaffe v. Harteau*, 56 N. Y. 398, 401; *Greene v. Hague*, 10 Bradw. (Ill.) 598. And the rule is held although, as to the preceding tenant, the landlord may have been guilty of trespass in stripping the premises. *Peterson v. Smart*, 70 Mo. 34. In *Johnson v. Dixon*, 1 Daly, 278; *Eagle v. Swayze*, 2 *id.* 140, the landlord was held for injuries to tenant from non-repair. But these cases are clearly not law. *Post*, §§ 327 *et seq.*, and the case of *Johnson v. Dixon*, *supra*, is overruled in *Arnold v. Clark*, 45 N. Y. S. C. 252. In *Scheerer v. Dickson*, 3 Brewst. 276, the lessor's liability depended on custom.

<sup>3</sup> *Miner v. Sharon*, 112 Mass. 477, where the lessor did not disclose that the premises were infected with small-pox. So *Wilson v. Finch Hatton*, 2 L. R. Exch. 236, where the condition of the drains was not fairly stated by the lessor. See also *Scott v. Simons*, 54 N. H. 426.

entry.<sup>1</sup> And the subtenant, servant, employee, or even customer of the lessee, is under the same restriction; because entering under the tenant's title, and not by any invitation, express or implied, from the owner, they assume a like risk.<sup>2</sup>

Where, however, the landlord retains possession or control of any part of the tenement, the rest of which is under the demise, while his duty to third persons is complete,<sup>3</sup> his liability to the tenant depends on the exclusiveness of his possession and active control.<sup>4</sup> If the tenant has access to and

<sup>1</sup> *Eakin v. Brown*, 1 E. D. Smith, 36; *Wilson v. Finch Hatton*, *supra*. See *Bowe v. Hunkin*, 135 Mass. 380, where the doctrine of *caveat emptor* is applied as against a tenant entering with full opportunity of examining the condition of the leased premises.

<sup>2</sup> *O'Brien v. Capwell*, 59 Barb. 497; *Robbins v. Jones*, 15 C. B. n. s. 221; *Nelson v. Liv. Brew.*, 2 L. R. C. P. Div. 311. In *Stratton v. Staples*, 59 Me. 94, the defective construction was not on the demised premises; and in *Scott v. Simons*, *supra*, the rule is limited to concealment or overt use by the landlord of the part retained. See *Alston v. Grant*, *infra*. In *Jaffe v. Hartean*, 56 N. Y. 398, the landlord was held not liable to tenant's servant for a defective boiler.

Where the statute imposed an absolute duty on the landlord, as, to provide suitable means of escape from the premises in case of fire, it was held (upon the general principle that where the statute imposes a duty on a citizen, any person having an interest in the performance thereof may sue for a breach causing him injury) that a tenant in occupation might sue for damage occasioned him by the absence of such suitable means; and further, that his occupancy of the premises, after discovering the absence of such means, for a reasonable time in which to notify the landlord of such absence would not deprive him of his remedy. *Willy v. Mulledy*, 78 N. Y. 310.

<sup>3</sup> *Kirby v. Boylst. Mkt.*, 14 Gray, 249; *Shipley v. Fifty Assoc.*, 101 Mass. 251; 106 *id.* 294; *Centre v. Davis*, 89 Ga. 310, where the lessor was held under the statutory requirement to keep in repair. But if he retains no portion of the premises, his responsibility ceases. *Leonard v. Storer*, 115 Mass. 86.

<sup>4</sup> *Tenant v. Goldwin*, 2 Ld. Ray. 1019; *Priest v. Nichols*, 116 Mass. 401. A landlord of rooms in a building leased to different tenants is bound to use reasonable care to keep the common staircase in repair, and, failing to do so, he is liable for injuries resulting to one of the tenants by reason of defects in the staircase. *Looney v. McLean*, 129 Mass. 33; *Donohue v. Kendall*, 50 N. Y. S. C. 386. But see, *contra*, *Purcell v. English*, 86 Ind. 84, where the decision rests on an application of the rule that there is no implied warranty of the fitness of premises for occupation.

means of remedying the defect, or had implied notice of it so that he took the risk of it when entering, he cannot hold the landlord responsible.<sup>1</sup> If however, the latter's overt act produces the injury, he will be answerable to the tenant as well as to a stranger,<sup>2</sup> while for mere non-feasance no action lies.<sup>3</sup> The landlord is moreover entitled to his insurance, notwithstanding the negligence of his tenant, if he used due care in his selection of an occupant.<sup>4</sup>

But the better opinion is that in cases where the landlord retains control of the premises the rule of no warranty does not apply. *Toole v. Beckett*, 67 Me. 544.

<sup>1</sup> *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Dunn v. Birm. Coal Co.*, L. R. 7 Q. B. 244; *Robbins v. Mount*, 4 Rob. (N. Y.) 558; *Taylor v. Bailey*, 74 Ill. 178; *Woods v. Naumkeag Steam Col. Co.*, 134 Mass. 357, where the rule was applied as against one of several tenants, who had been injured by falling on ice accumulated upon a common stairway, through the alleged improper construction of such stairway; the defect having existed before the beginning of the tenancy. So in *Ross v. Fedden*, L. R. 7 Q. B. 661, an upper tenant was held not liable to a lower tenant for injury from a structural defect existing when the latter entered, and not chargeable to negligence on the part of the former. But where the injury results from the negligence of the upper tenant he is responsible therefor. *White v. Montgomery*, 58 Ga. 204. See *Freidenburg v. Jones*, 63 *id.* 612; *Jones v. Freidenburg*, 66 *id.* 505. In *Fera v. Child*, 115 Mass. 32, the tenant expressly took all risks. The case of *Marshall v. Cohen*, 44 Ga. 489, turned on a statute requirement.

<sup>2</sup> *Elliott v. Pray*, 10 Allen, 378; *Watkins v. Goodall*, 138 Mass. 533; *Kimmell v. Burfeind*, 2 Daly, 155; *Worthington v. Parker*, 11 *id.* 545; *Alston v. Grant*, 3 Ellis & B. 128; *Totten v. Philipps*, 52 N. Y. 254; *Alger v. Kennedy*, 49 *id.* 109.

<sup>3</sup> *Pomfret v. Ricroft*, 1 Saund. 323; *Tenant v. Goldwin*, *Doupe v. Genin*, *supra*; *Chauntler v. Robinson*, 4 Exch. 163; *Krueger v. Ferrant*, 29 Minn. 385.

<sup>4</sup> *White v. M. I. Co.*, 8 Gray, 566. But see *Stinemetz v. Ins. Co.*, 6 Phila. 21.

## SECTION II.

## ON THE PART OF THE TENANT.

§ 176. **Nature of his Interest. — When it attaches. — Right of Possession.** — The rights, as well as the liabilities, of a tenant for life attach upon the execution and delivery of the lease or on the vesting of the estate; but, in case of a lease for years, they commence from the making of the contract. Before a tenant for years enters into possession, he acquires an interest in the term, whether the lease is to commence at once or on a future day.<sup>1</sup> This interest is assignable, and, in case of the death of the lessee before taking possession, will pass to his executors or administrators. If, however, a person entitled to an estate for years enters, and is put out of possession, he cannot afterwards assign his term to a stranger; for, although by his entry the estate for years became vested, yet being afterwards defeated by the entry of a stranger, the lessee has only a right of entry left to him, which the policy of the law will not suffer him to transfer, because it is a mere right of action.<sup>2</sup> His right of possession becomes complete on the day fixed by the agreement for the commencement of the term; and, when that day arrives, he will be entitled to the possession of the premises in the same condition in which they were on the day of the demise. That he has agreed to make alterations or repairs upon the premises in the mean time, and failed in performance, is not a condition precedent to the vesting of his estate.<sup>3</sup> And one who has agreed for a lease must take the premises as they stand, and cannot call upon the lessor to put them in better condi-

<sup>1</sup> *Whitney v. Allaire*, 1 N. Y. 305.

<sup>2</sup> *Bruerton v. Rainsford*, Cro. El. 15; *Saffyn's Case*, 5 Co. 124, a; 2 Roll. Abr. 850. In Delaware, an incoming tenant is held to be entitled, from custom and necessity, to enter before his term commences, for the purpose of filling the ice-house on the premises. *State v. McClay*, 1 Harringt. 520.

<sup>3</sup> *Lowell Meeting-House v. Hilton*, 11 Gray, 407.

tion, or make them more comfortable to live in, independently of an agreement to that effect.<sup>1</sup> If possession is withheld, he may maintain an action of ejectment against any person, even the lessor, who wrongfully withholds it;<sup>2</sup> or, if possession is withheld by the lessor, or one under his authority, he may at his option entirely repudiate the contract, or bring an action for damages against the landlord for a breach of his agreement.<sup>3</sup> He may also repudiate, if he finds he has been defrauded in the negotiation for the lease. But he cannot avoid his responsibilities on the ground of the lessor's misrepresentations, if he does not rescind at once on discovering the fraud; nor so long as he retains possession.<sup>4</sup> His term of years is liable to be sold under an execution against him, like any other chattel; although the judgment will not be a lien upon it, either at common law or by statute.<sup>5</sup> He becomes responsible for rent and upon all his other covenants in the lease from the time the term commences, although he should refuse to take possession of the property.<sup>6</sup> And if an-

<sup>1</sup> *Chappel v. Gregory*, 34 Beav. 250. And see *post*, §§ 327 *et seq.*; 382.

<sup>2</sup> *Remington v. Casey*, 78 Ill. 317; *Ollendorff v. Cook*, 1 Lans. 37.

<sup>3</sup> *Trull v. Granger*, 9 N. Y. 115; *Spencer v. Burton*, 5 Blackf. 57; *Clark v. Butt*, 26 Ind. 236. The English cases go further, and hold lessor liable to the lessee if possession is withheld by a stranger, considering the lessor bound to deliver "possession, and not merely the chance of a lawsuit." *Coe v. Clay*, 5 Bing. 440; *Jenks v. Edwards*, 11 Exch. 775. So in Missouri, *L'Hussier v. Zallee*, 24 Mo. 13; *Hughes v. Wood*, 50 *id.* 350. But most of the American courts do not hold lessor to this liability. *Gardner v. Keteltas*, 3 Hill, 330; *Becker v. Forest*, 1 Sweeny, 528; *Gozzolo v. Chambers*, 73 Ill. 75; *Pendergast v. Young*, 1 Fost. 234; *Cozens v. Stevenson*, 5 S. & R. 424; and *post*, § 312. If, before the day named for taking possession, the lessor wrongfully removes a fixture, so as to render the dwelling unfit for habitation, the lessee may refuse to take possession. *Cleves v. Willoughby*, 7 Hill, 83.

<sup>4</sup> *McCarty v. Ely*, 4 E. D. Smith, 375; *Milliken v. Thorndike*, 103 Mass. 382.

<sup>5</sup> *Ex parte Wilson*, 7 Hill, 150; and see *People v. Westervelt*, 17 Wend. 674; s. c. 20 *id.* 416. See *ante*, § 14, note.

<sup>6</sup> *Birkhead v. Cummins*, 36 N. J. 44; *Becar v. Flues*, 64 N. Y. 518; *Bellasis v. Burbriche*, 1 Ld. Ray. 170; s. c. Holt, 199; and see *Eaton v. Jaques*, Doug. 461. Under a joint lease to two tenants, the occupation of one is sufficient to make both liable for the rent. *Kendall v. Carland*, 5 Cush. 74.

other person enters into possession by the tenant's consent, he will be considered, in respect to the landlord's rights, as substituted in the tenant's place, although he may disclaim all privity with the tenant.<sup>1</sup>

§ 177. **Measure of Tenant's Damages as against Landlord.** — The measure of the damages which the lessee may recover from the lessor for the wrongful withholding of possession is the difference between the rent reserved in the lease, and the actual value of the lease to him.<sup>2</sup> If the landlord cannot put the lessee into possession of all the land he contracted to give or of the building which forms the principal inducement to the contract, the latter is under no obligation to accept the residue, and will be justified in abandoning the entire premises.<sup>3</sup> Yet if he prefers to occupy them, but does not obtain possession of all he hired, he is liable for rent on a *quantum meruit*, for the part occupied.<sup>4</sup> And though the lease may

<sup>1</sup> Howard v. Ellis, 4 Sandf. 369. If a tenant permits a third person to occupy the premises, it is equivalent to his own personal occupation, unless the landlord accepts the new occupant as tenant in place of the former one. Bacon v. Brown, 9 Conn. 338. It is not essential to a valid lease that the building which is the subject of the contract should be erected at the time the lease is made, or that the lessor be the owner of the ground upon which the building is to be placed. Haven v. Wakefield, 39 Ill. 509.

<sup>2</sup> Trull v. Granger, *supra*; Townsend v. Wharf. Co., 117 Mass. 501; Hughes v. Wood, 50 Mo. 350. But he cannot recover for the special use to which he would have put the demised premises unless this was known to the lessor. *Ib.* He may recover also the costs: Stedding v. Newell, L. R. 4 C. P. 212; and expenses incurred: Green v. Williams, 45 Ill. 206. In Hexter v. Knox, 42 N. Y. Sup. 8; 63 N. Y. 561, one who had hired a hotel and procured furniture was allowed to recover as for a furnished house. Nor can the damages be abated by the value of any other occupation the lessee could have engaged in during the term. Wolff v. Studebaker, 65 Pa. St. 459.

<sup>3</sup> Tunis v. Grandy, 22 Gratt. 109. So if he has given a note for rent in advance, he may defeat payment. Andrews v. Woodcock, 14 Iowa, 397.

<sup>4</sup> Hay v. Cumberland, 25 Barb. 594; Hurlburt v. Post, 1 Bosw. 28; Lawrence v. French, 25 Wend. 443. Under a lease for years, the destruction of the building by fire before the commencement of the term absolves the lessee, and entitles him to have the lease cancelled; for, until the term commences, the contract is purely executory, and possession is a condition



have been delivered after signing to the party interested, with a stipulation that such delivery shall be subject to the landlord's being satisfied with the reference as to responsibility given him by the tenant, it is a proper question for a jury, in an action for the non-performance of the agreement, whether, inquiry having been made, the answer given by the party referred to was such as reasonably satisfied the condition, the landlord having declared it was not satisfactory to him, and having on that ground refused to let the tenant into possession. And in such an action, the plaintiff may give evidence of any particular loss sustained by the breach of the agreement, if he has made a sufficient averment of loss in his declaration.<sup>1</sup>

§ 178. *Rights incident to Tenant's Possession.* — May defend it. — Liable for Waste, etc. — After taking possession, the tenant is at once invested with all the rights incident to possession, the use of all the privileges and easements appurtenant to the tenement; and may take such reasonable estovers and emblements as are attached to the estate, unless restrained by special agreement.<sup>2</sup> He may maintain an action against any person who disturbs his possession, or trespasses upon the premises, though it be the landlord himself, who has, in general, no right to enter and repair, unless by virtue of a stipulation to that effect; or unless the repairs are necessary to

precedent to any liability for rent. *Wood v. Hubbell*, 5 Barb. 601; s. c. 10 N. Y. 479. A dwelling-house and premises were demised for a year; the lessee accepted the lease, and by virtue of the demise entered upon the premises. Before and at the time of the demise, eight acres included in it had been demised to a third party, in whose possession they were, so that the lessee could not, and did not, enter upon them. Held, that the demise was altogether void. *Neale v. Mackenzie*, 1 M. & W. 747. Where there is a demise of premises, and an entire rent reserved, if any part of the premises could not be legally demised, the whole is void. *Doe v. Lloyd*, 3 Esp. 78, per Ld. Kenyon.

<sup>1</sup> *Ward v. Smith*, 11 Price, 19; *Coe v. Clay*, 5 Bing. 440.

<sup>2</sup> It is held in Indiana that there may be a valid parol reservation of the landlord's share of growing crops from a written lease, by the terms of which the lessee is to take possession before the maturity of the crop. The same rule is held in that State upon the conveyance of the fee by deed. *Hisey v. Troutman*, 84 Ind. 115.



prevent waste.<sup>1</sup> If a stranger enters and commits waste, the tenant will nevertheless be liable for such waste at the suit of his landlord, and will be left to his remedy over against the stranger.<sup>2</sup> And, after the term has expired, he may still re-

<sup>1</sup> *Leader v. Moxon*, 2 W. Bl. 924; *Bedingfield v. Onslow*, 3 Lev. 209; *Shadwell v. Hutchinson*, 2 B. & Ad. 97; *Barker v. Barker*, 3 C. & P. 557; *Harrison v. Blackburn*, 17 C. B. N. S. 678; even under a parol lease, *Wilber v. Paine*, 1 Ohio, 251. He may, although a tenant at will, maintain an action *quare clausum fregit* against a stranger for cutting and carrying away trees, *Hayward v. Sedgely*, 14 Me. 439; or even against his landlord where the estate has not been legally determined by notice to quit. *Dickinson v. Goodspeed*, 8 Cush. 119. A railroad company entering and constructing its road on the leased premises under the landlord's authority only is a trespasser on the tenant. *Crowell v. Railroad Co.*, 61 Miss. 631. Landlord and tenant may each maintain an action for injury to his particular estate. *Austin v. Huds. Riv. R. R.*, 25 N. Y. 334; *Bannon v. Mitchell*, 6 Bradw. (Ill.) 17. And it is held in Pennsylvania that the landlord and tenant from year to year may unite in such an action, and the jury apportion the damages as between the plaintiffs. *Getz v. Phil. & Read. R. R. Co.*, 105 Pa. St. 547. In the same State it was held, where a railroad company had the right of way over mining lands, and covenanted with the owner of the land that, upon notice, it would change its location, or permit the coal under the way to be mined, that a tenant of the owner, who under his lease had a right to mine all the coal in the land, might sue in the name of the landlord for breach of the covenant; and that, in such a suit, damages, which would be measured by the value of the coal left standing by reason of the way, might be apportioned by jury between the landlord and tenant. *Mine Hill R. R. Co. v. Lippincott*, 86 *id.* 468, *Sharswood & Paxon, JJ.*, dissenting. A person who took possession from one who falsely claimed to have an oral lease from the owner is, after remaining in for some time with the apparent acquiescence of the owner, to be deemed rightfully in possession until his tenancy is properly terminated, by notice or otherwise. The owner may not forcibly eject him, nor will he be justified in closing up the entrance to the premises, or in refusing to allow the tenant to remove his goods. And in an action for damages in such a case, the owner will be held liable for the value of the goods detained, as well as for the injury done by breaking up the business of the tenant. *Marquart v. LaFarge*, 5 Duer, 559.

<sup>2</sup> *Cook v. Champl. Tr. Co.*, 1 Den. 91; *Wood v. Griffin*, 46 N. H. 231; *Cal. Dry Dock Co. v. Armstrong*, 8 Sawyer, 523. The situation of a tenant is analogous to that of a common carrier, to prevent collusion (and not on the presumption of actual collusion); both are charged with the protection of the property intrusted to them, against all but the acts of God and the King's enemies. Per *Chambre, J.*, in *Attersoll v. Stevens*, 1

cover damages for an injury sustained during its continuance.<sup>1</sup> As occupant, he is, *primâ facie*, liable to answer for any neglect in the repair of fences, or party-walls, or for any improper use of the premises, for the fixtures thereon, — it being generally sufficient, except where a statute has otherwise provided, to charge a man for such repairs or damages by the name of occupant.<sup>2</sup> He is liable for all injuries produced by a nuisance kept upon the premises, or by an obstruction of the highway adjacent to them.<sup>3</sup> Also, for not properly covering an old shaft of a mine, whereby the plaintiff's horse fell down and was killed;<sup>4</sup> for not properly covering a coal-hole, cellar-entrance, sewer, or railing of an area opening into the highway, allowing a sink to overflow to the injury of his neighbor, or the like.<sup>5</sup> He is also responsible for any im-

Taunt. 198. And, in Louisiana, if he abandons the premises before the expiration of the lease, he is at once bound for the rent of the whole term, and may be sued. *Christy v. Casanave*, 2 Martin, N. S. 451.

<sup>1</sup> 2 Roll. Abr. 551; *Symonds v. Seabourne*, Cro. Car. 825; *Bedingfield v. Onslow*, *supra*; *Holt*, N. P. C. 543. It seems that, at common law, when premises burglariously entered are in possession of the tenant, such premises are to be charged in the indictment to be the tenant's property. *McGrillis v. State*, 69 Ind. 159. But by statute in Indiana, R. S. 1881, § 1753, such premises may properly be charged to be the property either of the landlord or the tenant. *Kennedy v. State*, 81 *id.* 379.

<sup>2</sup> *Althorf v. Wolfe*, 22 N. Y. 355; *Chicago v. Brennan*, 65 Ill. 160; *Regina v. Bucknall*, 2 Ld. Ray. 792; *Rider v. Smith*, 3 T. R. 766; *Cheetham v. Hampson*, 4 *id.* 318. And see *ante*, § 175. The occupant, and not the owner of land, is bound to repair drains and sewers; hence, in a suit by an adjoining owner for non-repair thereof, the declaration must allege occupation by the defendant. *Russel v. Shenton*, 8 Q. B. 449. Where a town was compelled to pay damages for a defective sidewalk, attached to premises in the possession of a tenant, the tenant was held liable to reimburse the town for such payment. *Lowell v. Spaulding*, 4 Cush. 277.

<sup>3</sup> *Marriott v. Stanley*, 1 M. & G. 568. If a house on the highway be ruinous and likely to fall, it is a nuisance, and the occupant, although he be but a tenant at will, is bound to repair it; for, as the danger is the matter that concerns the public, the public is to look to the occupant and not to the estate. *Regina v. Watts*, 1 Salk. 357; *Odell v. Solomon*, 50 N. Y. S. C. 119.

<sup>4</sup> *Sybray v. White*, 1 M. & W. 435.

<sup>5</sup> *Payne v. Rogers*, 2 H. Bl. 349; *Leslie v. Pounds*, 4 Taunt. 649; *Laugher v. Pointer*, 5 B. & C. 559; *Mayor v. Corlies*, 2 Sandf. 301; *Stick-*

proper use of the water-pipes; and for any overflow caused either by a neglect to turn off the water when required, or by such a misuse of the works as deprives them of power to stop the flow of water.<sup>1</sup> And that the premises were in the same unsatisfactory condition before the defendant came into possession of them, or that the person injured was intoxicated at the time of the accident, is no defence;<sup>2</sup> for the occupant who continues a nuisance is as liable as the one who created it.<sup>3</sup>

§ 179. **Must preserve Boundaries.** — **Enlargements presumed to follow the Reversion.** — **Public Burdens.** — He must be careful to preserve the boundaries of the land demised to him; for if he permits them to be lost or destroyed, so that the lessor's premises cannot be distinguished from his own, he must either restore the land specifically, or give him other land of equal value.<sup>4</sup> If he encloses land, whether adjacent to or in the vicinity of the demised premises, and whether the land be part of the waste or of the highway, or belongs to the landlord or some third person, the presumption at the end of the term is, that the enclosure is part of the holding and was made for the benefit of the landlord.<sup>5</sup> And such presumption is not rebutted by the fact that the land taken in by the encroachment is separated by a brook from that which the

ney v. Monroe, 44 Maine, 195; Pickard v. Collins, 23 Barb. 444; and see *ante*, § 175.

<sup>1</sup> Warren v. Kauffman, 2 Phila. 259; Weston v. Incorp. of Tailors, Hay, 66; 14 F. C. 1232; Moore v. Goedel, 34 N. Y. 527; Killion v. Power, 51 Pa. St. 429. Where a water-closet in the upper part of a house overflowed in consequence of the valve being out of order, and there was no evidence of any negligence with regard to the fittings of the water-closet, or that the occupant knew the valve was out of order; it was held that he was not liable for the damage, as there was no obligation on him, under all circumstances and at all hazards, to keep the pipes from overflowing and his room water-tight. Ross v. Fedden, L. R. 7 Q. B. 661.

<sup>2</sup> Coupland v. Hardingham, 3 Camp. 398; Anderson v. Dickie, 1 Rob. (N. Y.) 238; Healey v. Mayor, 3 Hun, 708.

<sup>3</sup> *Ante*, § 175.

<sup>4</sup> Att'y-General v. Fullerton, 2 Ves. & B. 263; Willis v. Parkinson, 1 Swanst. 9.

<sup>5</sup> Andrews v. Hales, 2 Ellis & B. 349. So where he acquires a private right of way. Dempsey v. Kip, 61 N. Y. 462.

tenant occupies: for to fall within the rule it need not be immediately adjacent; it is sufficient that it be near.<sup>1</sup> He is also bound to the performance of all such duties as the ordinances of any city or town may from time to time impose upon him or the premises in his occupation, by virtue of his residence within the boundaries of such incorporation.<sup>2</sup>

§ 179 *a. Liabilities to Co-tenant.* — He must, at the same time, respect the rights of his co-tenant, and will render himself liable to an action for obstructing or disturbing him in the use of the premises:<sup>3</sup> and has no right to make improve-

<sup>1</sup> *Lisburne v. Davies*, L. R. 1 C. P. 259; *Kingsmill v. Millard*, 11 Exch. 313. This presumption does not seem to prevail for the landlord's benefit as against third persons: *Doe v. Massey*, 17 Q. B. 373; or if the tenant during the term does some act disclaiming his landlord's title: *Kingsmill v. Millard*, *supra*; nor if he has been in possession of such land previous to his taking a lease of the adjoining land: *Dixon v. Bates*, L. R. 1 Exch. 259; and a fence fronting on a highway for twenty years is not to be taken as the true boundary thereof, if the original boundary can be made certain by ancient monuments, although they are not now in existence: *Wood v. Quincy*, 11 Cush. 487.

<sup>2</sup> *Rex v. St. Luke's Hosp.*, 2 Burr. 1053; *Milward v. Caffin*, 2 W. Bl. 1330.

<sup>3</sup> Per Wilde, J., in *Keay v. Goodwin*, 16 Mass. 8; *Newton v. Newton*, 17 Pick. 201. In a case arising in the city of New York, the first story, with the basement and under-cellar, of a four-story store was leased to the plaintiffs, and the three upper stories to the defendant, at the same time, each with the appurtenances. The entrance to the upper stories was in front, over a short entry leading to a staircase. This entry was separated from the residue of the first floor by three folding-doors, with bolts to fasten on either side. There was a hatchway in the floor of the same entry, leading to the basement and cellar, over which hatch a tackle and fall were placed, to raise and lower goods, the wheel of which was in the attic, and was worked by ropes passing down through the respective floors. The keeping of the folding-doors open in business hours was a great advantage to the occupant of the first floor. The opening of the hatch in that floor obstructed the passage to the upper stories, unless persons passed through the folding-doors. In a contest as to the rights of the respective parties, the Superior Court of the city of New York held that the tenant of the first and under stories had the right to use the hatchway in the entry, and the tackle and fall for depositing the goods in the basement and cellar, and elevating them therefrom, making use of them in good faith, and not keeping the hatch open unnecessarily; that the tenant of the first floor had the right to keep the folding-doors open

ments on the property and charge his co-tenant with a proportion of the expense, without the consent of the co-tenant, express or implied; although he may make such repairs as are necessary to preserve the property from waste, at the expense of all the joint owners, without asking their consent.<sup>1</sup> He may purchase an outstanding or adverse claim to the common property, but equity will not permit him to acquire such a title, and hold it for his own benefit to the exclusion of the others;<sup>2</sup> whether he purchases in his own name, or procures another person to purchase for him.<sup>3</sup> This rule, however, will be modified by circumstances, whenever its strict application would be inequitable.<sup>4</sup> But the other co-tenant must exercise reasonable diligence in making his election to participate in the benefit of the purchase; and unless he makes such an election, and contributes or offers to contribute his proportion of the purchase-money actually paid, he will be deemed to have repudiated the transaction.<sup>5</sup> Nor can he maintain an action against his co-tenant in trespass for an entry upon the land, or for damages sustained by a neglect to repair, without a previous request by the plaintiff to join in making such repairs.<sup>6</sup>

during business hours in the daytime, free from the control of the tenants of the lofts, and that each had the right to close and fasten them at night; and that the tenant of the lofts might pass in and out through the folding-doors, when the hatchway was in use by the tenant of the first floor. *Browning v. Dalesme*, 3 Sandf. 18. When the lessee in possession of premises has, under the lease, the right to erect and maintain signs in front of a portion of the property, the lessee of another part of the same building will be restrained by injunction from impairing such right. Both the landlord and those claiming under him are estopped from acts which defeat the right. *Snyder v. Hersberg*, 11 Phila. 200.

<sup>1</sup> *Calvert v. Aldrich*, 99 Mass. 74; *Taylor v. Baldwin*, 10 Barb. 626; *Story*, Eq. § 1235; *Loring v. Bacon*, 4 Mass. 575; *Converse v. Ferre*, 11 *id.* 325; *Mumford v. Brown*, 6 Cow. 475; *Coffin v. Heath*, 6 Met. 80; *ante*, §§ 114-117.

<sup>2</sup> *Burhans v. Van Zandt*, 7 N. Y. 528; *Van Horn v. Fonda*, 5 Johns. Ch. 388.

<sup>3</sup> *Dubois v. Campau*, 24 Mich. 360; *Duff v. Wilson*, 72 Pa. St. 442.

<sup>4</sup> *Buchanan v. King*, 22 Gratt. 14; *Freutz v. Klotch*, 28 Wisc. 312.

<sup>5</sup> *Mandeville v. Solomon*, 39 Cal. 125, 133.

<sup>6</sup> *Van Orman v. Phelps*, 9 Barb. 500; *Moody v. Buck*, 1 Sandf. 304; *Doane v. Badger*, 12 Mass. 95; nor to recover documents relating to the

§ 180. **Not to deny Landlord's Title, nor attorn to Stranger.**—The tenant must also regard the interest of his landlord, with respect to possession, and not only maintain fealty himself but give due notice of any attempt made to dispossess him.<sup>1</sup> His possession is always to be considered the possession of the lessor, and he is never permitted to deny the title under which he entered.<sup>2</sup> A tenant in possession under one title can make no valid attornment to any one not in privity with that title.<sup>3</sup> If, however, a tenant should acquiesce in

joint estate, although an action of waste, or an injunction to stay waste, will lie as between joint tenants or tenants in common: *Hawley v. Clowes*, 2 Johns. Ch. 122; s. c. 12 Johns. 484; 2 N. Y. R. S. 334, § 3; *Smallman v. Onion*, 3 Bro. Ch. 621; *Hole v. Thomas*, 7 Ves. 589; *Twort v. Twort*, 16 *id.* 128. Persons who occupy the same building, and have each the privilege of using the water-pipes, can only be held responsible for damages resulting from their negligent use or care, on proof of negligence on their part; and neither is responsible for the negligence of the others; though they may be jointly liable if their obligations under the lease are joint. *Moore v. Goedel*, 7 Bosw. 591.

<sup>1</sup> The relation of landlord and tenant is so far confidential as to render it inequitable for a tenant, who is also a lien creditor to issue execution and buy in the property at a sheriff's sale without notice to the landlord, and the landlord, upon payment, may attack a title so obtained. *Mathews' Appeal*, 104 Pa. St. 444, and see *Lansman v. Drahos*, 10 Neb. 172.

<sup>2</sup> The statutes of New York, in order to secure the landlord against collusion between his tenant and third persons, and thereby prevent a change of possession to his prejudice, oblige every tenant to whom a declaration in ejectment, or any other process, proceeding, or notice of any proceeding, to recover the land occupied by him, or the possession thereof, shall be delivered, forthwith to give notice thereof to his landlord, under the penalty of forfeiting three years' rent of the premises so occupied by him; which may be sued for and recovered by the landlord, or person of whom the tenant holds. 1 R. S. 748, § 27. Under this statute it has been held that a landlord, or other person, who is entitled by statute to be substituted in the place of, or joined with, the defendant in an action of ejectment, who, without causing himself to be made a party, defends such suit unsuccessfully, in the name of the original defendant, will be ordered to pay the costs of the plaintiff, on motion, after execution against the defendant on the record has been returned unsatisfied. *Farmers' L. & T. Co. v. Kursch*, 5 N. Y. 558.

<sup>3</sup> *Fuller v. Sweet*, 30 Mich. 237. So by statute in Mississippi, *Tucker v. Whitehead*, 53 Miss. 762; *McNamee v. Relf*, 52 *id.* 426. See to the general rule, *Johnson v. Futch*, 57 Miss. 73; *Bryant v. Winburn*, 43 Ark. 28; *Marsan v. French*, 61 Tex. 173. Where the landlord by his own



the wrongful act of a stranger, it will not bind the landlord when he regains possession ; as, if he suffers windows, newly opened by his neighbor, to remain unobstructed for more than twenty years, and so to become ancient lights, the landlord, at the expiration of the term, will not be bound thereby, but may shut up the lights, or treat them as if they had been newly opened.<sup>1</sup>

§ 181. **To be compensated for Injury done for public Benefit.** — At common law any person, in case of actual necessity and to prevent the spread of a fire, might prostrate a building in a block or street, without being responsible in trespass or otherwise ; and the sufferer had no legal redress for any injury he might have sustained against the individual who did the act.<sup>2</sup> But the injured party, in all cases where his prop-

acts acknowledges the title of another, he is estopped to enforce a claim for rent against a tenant who, relying on such acts, has paid rent to the other party. *Winterink v. Maynard*, 47 Iowa, 366. Where the lessor is one of two claimants to land, his lessee in possession and paying rent to him, cannot be held liable for rent to the other claimant, since he could not have resisted suit brought by his lessor to recover such rent. *Keith v. Paulk*, 55 *id.* 260. As to an attornment to a mortgagee, see *Jones v. Clark*, 20 Johns. 51; *Magill v. Hinsdale*, 6 Conn. 464; *Smith v. Shepard*, 18 Pick. 147. By statute in Iowa an attornment is void unless to a mortgagee "after the mortgage has been forfeited," these words being construed to mean after the mortgage has been foreclosed, and the period for redemption expired, the mortgagor being entitled to redemption. *Mills v. Hamilton*, 49 Iowa, 105. By 1 R. S. 744 (N. Y.), § 3, the attornment of a tenant to a stranger is absolutely void ; and will not in anywise affect the possession of his landlord, unless it be made, — 1. With the consent of the landlord ; 2. Pursuant to or in consequence of a judgment at law, or the order of a court of equity ; or, 3. To a mortgagee after the mortgage has become forfeited. "Wherever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy ; or, where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent ; notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumption shall not be made after the periods herein limited." 2 R. S. 294, § 13.

<sup>1</sup> *Jesser v. Gifford*, 4 Burr. 2141; *Daniel v. North*, 11 East, 372.

<sup>2</sup> *Republica v. Sparhawk*, 1 Dall. 357; 2 Kent, Com. 338; *White v.*

erty was taken and destroyed for the public good, was held to be entitled to compensation from the public.<sup>1</sup> The Constitution of the United States affirms the common-law principle, and provides that private property shall in no case be taken for public use, without just compensation being made.<sup>2</sup> The application of this principle extends not only to the rights of the owner of the building, but to the protection of the tenant's interest also, who is entitled to recover damages from the public treasury, not only for his interest in the building, but also for the merchandise or other personal property belonging to him which was in, and destroyed with the building. This was so held in a case arising out of the great fire which occurred in the city of New York in December, 1835; where the court recognized the principle that, in case of necessity, and to prevent the spread of a fire, the ravages of a pestilence, or any other great public calamity, the private property of an individual may be taken and destroyed for the good of the many, without subjecting those whose duty it is to protect the public interests to any personal liability for the damage which the owner thereby sustains; but that in all such cases, as well as in the event of a building being destroyed by a mob, the public, or the corporation of the city within whose bounds such destruction happens, are liable to make good all

City Council, 2 Hill (S. C.), 571. In the Saltpetre case, 12 Co. 13, it was resolved by all the judges "that for the commonwealth, a man shall suffer damage; as, for saving a city or a town, his house shall be plucked down, if the next be on fire; and a thing for the commonwealth every man may do without being liable to an action." And the same principle was afterwards adjudged in *Mouse's Case*, *id.* 63, which was an action of trespass against the defendant, who was a passenger in a barge, for throwing out the goods of the plaintiff in a storm; where the court held that, in case of necessity, and to save the lives of the passengers, it was lawful for the defendant to cast the goods out of the barge. See also *Dyer*, 36; *Bac. Abr.*, &c.

<sup>1</sup> Per Buller, J., *Governor v. Meredith*, 4 T. R. 797.

<sup>2</sup> Const. U. S. art. 5 of Amend. This provision of the Constitution is understood to apply to cases where property is taken by the United States authorities for public uses. But the legislatures of all the States have also provided some mode of compensation for an injured individual, where his property has been taken or destroyed for the public good.



damages which either landlord or tenant may suffer thereby.<sup>1</sup> It was admitted, however, in the same case that no damages are recoverable against the city if the building, or the property therein, would have been inevitably destroyed by the flames, if it had not been pulled down; or if it was on fire, and beyond the hope of extinguishment, when the order of the magistrate to demolish it was given.<sup>2</sup>

§ 182. **Liability to Third Persons. — To Under-tenants.** — As third persons are liable to both landlord and tenant for injuries committed by them, so, on the other hand, both landlord and tenant may, as we have seen, respectively become liable to such third persons.<sup>3</sup> But, where it is the business of the county or parish to repair, neither landlord nor tenant

<sup>1</sup> *Mayor v. Lord*, 17 Wend. 285; s. c. 18 *id.* 126; *Same v. Pentz*, 24 *id.* 668. But owners of goods who have no estate or interest in the building thus destroyed have no claim to damages for their destruction. *Stone v. Mayor*, 25 Wend. 157; *Russell v. Mayor*, 2 Den. 464. The fact that the owner is insured does not affect his right to compensation, nor entitle the corporation to a deduction for the amount recoverable, or which has been received upon the policy; for the insurers would be entitled to subrogation, or to a reduction for the amount received by the owner from the city. *Mayor v. Pentz*, *supra*. Where the provisions in a lease for years gave the lessee rights which were not incident as of course to his tenancy, and imposed on him duties such as do not necessarily fall upon a lessee for years, it was held that such provisions were not such modifications of the relation of the tenant and the reversioner as to make their interests other than merely successive in point of time in a portion of the leased premises taken for public purposes under the right of eminent domain; and that, therefore, the damages for such taking were to be assessed and awarded in a gross sum, and were payable to a trustee for the parties appointed for that purpose under the statute. *Boston v. Robbins*, 126 Mass. 384.

<sup>2</sup> See also *Pentz v. Ætna F. I. Co.*, 9 Paige, 568. A claimant against the city must be able to show, with reasonable certainty, that the act of pulling down was wholly unnecessary, in order to take the case out of the ordinary losses by fire. And if, at the time it was done, the buildings all around were on fire, and were afterwards destroyed; and, according to every probability, the fire would have destroyed the building in question if it had not been blown up, it is a loss by fire within the meaning of a policy of insurance, payable by the insurer, and not by the city. *Corlies v. City F. I. Co.*, 21 Wend. 367.

<sup>3</sup> *Payne v. Rogers*, 2 H. Bl. 350. *Ante*, §§ 175, 175 a.

will be responsible for the damages.<sup>1</sup> If a stranger, whose goods have been, or are about to be, distrained upon the tenant's premises, should, in order to redeem them, be obliged to pay the rent, he may recover it again from the tenant, as for money paid to his use.<sup>2</sup> And the same rule applies where the goods of a lodger, or an under-tenant, have been so taken.<sup>3</sup> But an under-tenant, whose goods have been sold under a distress warrant issued by the original landlord for rent due from his immediate tenant, cannot maintain an action *for money paid* to the use of the latter, because the money never was the under-tenant's; for, on the sale under the distress, the money paid by the purchaser immediately vested in the original landlord.<sup>4</sup>

### SECTION III.

#### DIVISION FENCES AND PARTY-WALLS.

§ 183. **Tenant bound to maintain. — Common-law Rule. —** We have observed that the tenant, by virtue of his occupation, is liable to third persons for the consequences of a neglect to keep up and repair division fences, party-walls, and highways; his liability in this respect being coextensive with that of the landlord.<sup>5</sup> At common law no person was bound to fence his

<sup>1</sup> *Russell v. Men of Devon*, 2 T. R. 671. Either one or the other, according to circumstances, may be liable for a variety of wrongful acts, see §§ 775, 776, &c.

<sup>2</sup> *Sapsford v. Fletcher*, 4 T. R. 511.

<sup>3</sup> *Exall v. Partridge*, 8 T. R. 308.

<sup>4</sup> *Moore v. Pyrke*, 11 East, 52. Where a lessee for years abandons the premises, the lessor, for the preservation of the property and the protection of his interests, may collect rent from the under-tenants, and procure new ones, for the benefit of the lessee; and, if he has never refused to place the property under the lessee's control, on his complying with the lease, such acts will not be considered as a cancelling of the lease and the lessee and his surety will be bound for the difference between the amount of the rent payable by the lease, and that received from the under-tenants. *Roumage v. Blatrier*, 11 Rob. (La.) 101.

<sup>5</sup> *Taylor v. Whitehead*, 2 Doug. 745; *St. Louis, V. & T. R. R. v. Washburn*, 97 Ill. 253; *Baynes v. Chastain*, 68 Ind. 376.

land against the cattle of another; and for any trespass they might commit their owner was answerable, whether they entered from his own close, the close of a third person, or from the highway.<sup>1</sup> But as the settlement of lands progressed, and fences were found convenient for preventing disputes between neighbors, their maintenance gradually ripened into permanent obligations, and became the subject of statutory regulation. In some States the common-law rule does not seem to have been adopted, the owner of animals being under no obligation to fence them in, and they may wander over any unfenced land as if it were a common. The occupant of land must keep them out of his grounds at his peril, and is justified in driving them away from his unfenced land in any reasonable manner; but still, if they break through a sufficient fence, they are liable for damages consequent upon the trespass, as at common law.<sup>2</sup> In other States the matter is regulated by general statutes, or by local ordinances. Thus, in New York it is provided that, when two or more persons shall have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them.<sup>3</sup>

§ 184. **Statutory Provisions.**—Similar statutes exist in Maine, Vermont, Indiana, New Jersey, and other States; some of them preventing any recovery against the owner of

<sup>1</sup> *Stafford v. Ingersol*, 3 Hill, 38; *Hilton v. Aukesson*, 27 L. T. N. S. 519. *Rust v. Low*, 6 Mass. 90; *Minor v. Deland*, 18 Pick. 266; *Thayer v. Arnold*, 4 Met. 589.

<sup>2</sup> *Cleveland R. Co. v. Elliott*, 4 Ohio, 474; *Waters v. Moss*, 12 Cal. 535; *Laws v. N. C. R. R. Co.*, 7 Jones (N. C.), 468; *N. Y. & Erie R. Co. v. Skinner*, 19 Pa. St. 301; *Herold v. Myers*, 20 Iowa, 378; *Stover v. Shugart*, 45 Ill. 76; *Larkin v. Taylor*, 5 Kans. 483; *McManus v. Finan*, 4 Iowa, 288.

<sup>3</sup> By the laws of New York, 1867, May 9, it is unlawful for cattle of any description to run at large in any public street, park, place, or highway. And the overseers of highways within their districts, and street commissioners in incorporated villages, are required to seize them wherever found, and enforce the penalty prescribed by law. Any private person may also seize any animal trespassing on land owned or occupied by him, or in the highway opposite to his land. See also *Avery v. Maxwell*, 4 N. H. 36; *Stackpole v. Healy*, 16 Mass. 33.

cattle breaking through an insufficient fence, and others empowering a land-owner to repair, at the expense of an adjoining proprietor, fences which the latter neglects to repair.<sup>1</sup> Sometimes an exception is made in favor of the owner of land who prefers to let his land lie open; but this is by no means a desirable privilege to exercise, for the owner of all domestic animals, being bound, at his peril, to restrain them from trespassing upon the lands of his neighbor, is not only precluded, if he neglects to do so, from recovering damages arising from any injury they may sustain by going upon those lands, but is himself liable to make compensation for any trespass they may commit, whether he knows of their vicious propensities or not.<sup>2</sup> Fences are in fact designed to keep one's own cattle at home, and not to guard against the intrusion of those belonging to other people. But, whether fenced or not, an owner of land will in no case be justified in injuring domestic animals found trespassing thereon; and if he does so, he will be liable for all the injury he inflicts. He is only entitled to an action for the trespass, or may impound the animals, if he thinks proper, to procure satisfaction for the damage done by them; and this he may do at any time, unless their owner

<sup>1</sup> *Myers v. Dodd*, 9 Ind. 290; *Chambers v. Mathews*, 3 Harrison, 368; *Holden v. Shattuck*, 34 Vt. 336; *Wills v. Walters*, 5 Bush, 351; *State v. Perry*, 64 N. C. 305; *Eames v. Patterson*, 8 Greenl. 81.

<sup>2</sup> *Holladay v. Marsh*, 3 Wend. 142; *Little v. Lathrop*, 5 Greenl. 356; *Bush v. Brainard*, 1 Cow. 78; *Clark v. Brown*, 18 Wend. 221; *Beckwith v. Shordike*, 4 Burr. 2092; *Angus v. Radin*, 2 South. 815; *Dolph v. Fenis*, 7 W. & S. 367. This subject has been fully considered in Massachusetts, where Parsons, C. J., laid down the law with great precision. After stating the principle just mentioned, and that it might be otherwise by force of prescription, where such prescription exists, he adds: "If bound by prescription to fence his close, he was not bound to fence it against any cattle but such as were rightfully in the adjoining close. If not bound at common law to fence his land, he was, nevertheless, bound to keep his cattle on his own ground, and prevent them from escaping. The legal obligation of the tenants of adjoining lands to make and maintain partition fences, where no prescription exists, and no agreement has been made, rests entirely on statutory provisions, and trespass will lie against the owner of cattle entering on the grounds of another, though there be no fence to obstruct them, unless he can protect himself by statute, prescription, or agreement." *Rust v. Low*, *supra*; *Little v. Lathrop*, 5 Greenl. 356.

can protect himself under some statute, or by a written agreement with his neighbor, or its equivalent prescription.<sup>1</sup> In New York, the statute applies only to the rights and obligations of tenants of adjoining closes.<sup>2</sup> The rights of persons having no interest in either of such closes remain unaffected by it, and are to be defined and protected by the common law. Consequently, the owner of an animal which trespasses upon another's land, breaking through the fence between that land and the land of a third person, can recover no damages for any injury sustained by reason of a defective fence of the defendant.<sup>3</sup> It has been also held that the statute does not extend to injuries sustained by the death of cattle caused by eating unripe corn when they are unlawfully in the field of the party who is in default for not keeping up his fence; nor is it intended to take away any previously existing common-law remedy, for such damages as may have been sustained by the negligence or misconduct of a neighbor.<sup>4</sup>

<sup>1</sup> *Matthews v. Fiestel*, 2 E. D. Smith, 90; *Palmer v. Silverthorn*, 32 Pa. St. 65; *Rust v. Low*, 6 Mass. 90.

<sup>2</sup> This regulates the liability to maintain existing fences already established, as between the proprietors of adjoining closes; and, unless one of the owners chooses to let his lands lie open, each party is bound to make and maintain one-half of the division fence; and if either party is in default, he has no remedy for a trespass committed by the cattle of the other. When the party who suffers by a trespass is not in fault, the same statute affords him a remedy, by calling in the fence-viewers, to appraise the ordinary damages that may accrue to his land, or to the crops, fruit-trees, shrubbery, or fixtures connected therewith. 1 R. S. 354, § 37, amended by law 1838, p. 253. Where a person shall have chosen to let his land lie open, if he shall afterwards enclose it, he shall refund to the owner of the adjoining land a just proportion of the value, at that time, of any division fence that shall have been made by such adjoining owner; or he shall build his proportion of such division fence. 1 N. Y. R. S. 353, § 31; *Hewitt v. Watkins*, 11 Barb. 409.

<sup>3</sup> *Rust v. Low*, *supra*; *Lawrence v. Combs*, 31 N. H. 331. The statute applies only in favor of the owner of animals lawfully upon the adjoining premises. *Holladay v. Marsh*, 3 Wend. 142; *Lord v. Wormwood*, 29 Me. 283.

<sup>4</sup> *Stafford v. Ingersol*, 3 Hill, 38. The owner of a close is obliged to fence only against cattle lawfully on the adjoining land. *Melody v. Reab*, 4 Mass. 471; *Stackpole v. Healy*, 16 *id.* 33; *Lyman v. Gipsen*, 18 Pick. 422.

§ 184 *a. Respective Duties of Parties.* — If disputes arise about the proportions of fence to be made by each proprietor, they must be settled by the fence-viewers of the place in which the lands are situated;<sup>1</sup> and then, if either party continues to neglect his portion of the fence, after a month's notice to repair, the other party may make a fence, at the expense of the party neglecting. The effect of the statute, requiring each of the owners of adjoining lands to maintain his proportion of the partition fence, after it has been divided, is to protect each from liability for any trespass committed upon the lands of the other, by reason of any defect in that part of the fence which the other was bound to keep up. If the cattle of the party whose portion of the fence is defective, trespass upon his neighbor in consequence thereof, the latter may have his damages appraised under the statute, instead of resorting to an action of trespass; but he is not bound to adopt this course, and may, if he prefers, still have his common-law remedy.<sup>2</sup>

§ 185. *Joint Obligation to maintain.* — But unless such a fence has been divided by an agreement between the parties, by a decision of the fence-viewers, or by prescription (that is, by at least twenty years' usage), neither party is obliged to make any particular part of it. There is a joint obligation, by which each is bound to make every part; and, if the fence be defective, each party is chargeable with the consequences of the deficiency. If either neglects to make or repair his just proportion, after notice, the other may make the whole, and recover the contributory share of the one so

<sup>1</sup> The assessors of taxes in each town, who are commissioners of highways in New York, are also *ex officio* fence-viewers for the town.

<sup>2</sup> *Clark v. Brown, supra*; *Saxton v. Bacon*, 31 Vt. 540. The damages which fence-viewers are authorized to ascertain, are such only as ordinarily accrue from defective fences; and they have no right to assess the value of cattle which escape through a defective fence into a corn-field, and eat so much corn that they die. *Id.* A zigzag or Virginia fence is not a proper fence. *Herrick v. Stover*, 5 Wend. 580; but see *Ferris v. Van Buskirk*, 18 Barb. 397. As to encroachment of fences upon highway, see *Case v. Thompson*, 6 Wend. 634; *Spicer v. Slade*, 9 Johns. 359; *Fitch v. Comm'rs*, 22 Wend. 132.

neglecting.<sup>1</sup> And upon the escape of cattle from either close into the other, through a defect in any part of the fence, the owner of the cattle is not permitted to allege the escape to be from the deficiency of the other's fence.<sup>2</sup> If a man's cattle are lawfully placed on A.'s land, and escape thence to the land of another, their owner is entitled to the same exemption from liability that A. might claim in case the cattle had been his, but nothing more. And when B.'s cattle were rightfully pasturing on A.'s land, and escaped thence to the adjoining land of C., through a defect in the division fence which A. was bound to repair, C. was allowed to maintain trespass against B.<sup>3</sup> Although if A. had the care and custody of such cattle for the purpose of depasturing them, he would also have been liable in the same manner, and to the same extent, as the owner.<sup>4</sup>

§ 186. **Certain Animals kept at Owner's Peril — Highways not Pasture.** — With regard to such animals as are not usually restrained by fences, the owner, whether landlord or tenant, must still keep them on his premises at his peril; and, if they injure his neighbor, he is accountable for the trespass, without regard to the sufficiency of the enclosure. But if they are such as are usually restrained by fences, he is not liable for damages if they escape from his premises into his neighbor's land, through the defect of a fence which the neighbor is legally bound to repair.<sup>5</sup> A dog is also said to be an excep-

<sup>1</sup> Matter of Roch. & S. R. R. 4 Paige, 553. Any one occupying land as tenant at will, or sufferance, is entitled to the benefit of the statute of division fences, and may maintain an action for the expense of repairing the portion of the adjoining owner. The statute is for the benefit of occupants, without respect to the particular estate enjoyed. *Bronk v. Becker*, 17 Wend. 320. But it applies only in favor of the occupants of adjoining lands. *Stafford v. Ingersol*, 3 Hill, 38.

<sup>2</sup> *Rust v. Low*, 6 Mass. 90.

<sup>3</sup> *Stafford v. Ingersol*, *supra*.

<sup>4</sup> *Barnum v. Vandusen*, 16 Conn. 60.

<sup>5</sup> *Id.*; *Shepherd v. Hees*, 12 Johns. 433. The tenant of a land-owner who is bound by contract to maintain the fences along the track of a railroad company cannot recover against the company for an injury to his cattle occasioned by the failure of his landlord to maintain the fences. *Ind. P. & C. R. R. v. Petty*, 25 Ind. 413.



tion to the rule, for his owner is not liable for his trespasses.<sup>1</sup> And with respect to a highway, its dedication as such confers no right upon the public to use it as pasture-ground, or for any other purpose. Subject to the right of passage and to make repairs, the soil, together with the grass and other herbage growing thereon, are private property. If cattle, therefore, are placed upon it for the purpose of grazing, and escape into an adjoining close, the owner of the cattle, unless he owns the soil of that part of the highway on which he placed them, cannot avail himself of the insufficiency of the fences, in excuse of the trespass.<sup>2</sup> But if, while cattle are being driven along the highway, they stray from the sight of the person having them in charge on adjoining unenclosed land, and he makes fresh pursuit to bring them back, the owner will not be chargeable for this involuntary trespass on the land, nor for the herbage they may crop as they go along.<sup>3</sup>

§ 186 *a.* **Right to remove Fence.** — But no person is bound, either by statute or common law, to keep up a division fence always; for, if he wishes to throw his lands open, preferring to be remitted to his common-law rights and duties, and is not

<sup>1</sup> *Mason v. Keeling*, 12 Mod. 335; s. c. 1 Ld. Ray. 606.

<sup>2</sup> *Avery v. Maxwell*, 4 N. H. 36; *Wells v. Howell*, 19 Johns. 385; *North Penn. R. Co. v. Rehman*, 49 Pa. St. 101; *Lyman v. Gipson*, 18 Pick. 422. The same principle applies to a common; and, in an action for digging a pit on a common, by reason of which the plaintiff's mare, straying there, fell into the pit and was killed, it was held that no action lay; for the plaintiff had no right in the common, and so, as against him, the digging of the pit was lawful. *Blyth v. Topham*, Cro. Jac. 158. So, where maple sugar had been left by the defendant in buckets in an open shed on his own unenclosed woodland, and the plaintiff's cow came in the night and drank the syrup, which caused her death, it was agreed by the court that, although the defendant was guilty of gross negligence, yet the plaintiff, having no right to permit his cattle to go at large on the defendant's land, could not recover. *Bush v. Brainerd*, 1 Cow. 78.

<sup>3</sup> *Stackpole v. Healey*, 16 Mass. 35. If several animals belonging to different owners unite in doing mischief, each owner is liable for the damage done by his own animal only. *Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Den. 495; *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9. And, in the absence of proof as to how much damage was done by each, the presumption is that all the cattle did equal damage. *Partenheimer v. Van Order*, 20 Barb. 479.



restricted by any prescriptive right of the adjoining proprietor to have them maintained, he may remove his fences, after having given sufficient notice of his intention.<sup>1</sup> If, however, he removes his fence without having previously given the three months' notice required by the statute, a party who may be injured thereby is not limited to a suit for the recovery of the actual damages sustained in consequence of such removal; but may, after a month's notice, replace the fence, and recover the expense thereof in an action against his neighbor. If actual damages are sustained,—as the loss of a crop, for instance,—caused by the premature removal of the fence, such damages may be recovered in addition to the expense of the fence.<sup>2</sup> But if he gives the required notice, and then removes his portion of the fence, and his cattle pass through the opening upon his neighbor's land, he is liable for the trespass; for the only effect of the statutory permission is to remit the parties to their common-law rights and duties.<sup>3</sup> An occupant of land who is bound to maintain a division fence, may place half of it, of reasonable dimensions, on the land of the adjoining owner, and he may cut half of a ditch on the land of such owner when a ditch is proper for a partition fence.<sup>4</sup>

§ 187. **Right to erect Buildings.** — With respect to the erection of buildings, we observe that every proprietor of

<sup>1</sup> *Chrysler v. Westfall*, 41 Barb. 159. To exonerate a person from liability to contribute to the cost of a partition fence, he must give notice that he has elected to let his lands lie open to the public. *Perkins v. Perkins*, 44 Barb. 134.

<sup>2</sup> *Richardson v. McDougall*, 11 Wend. 46. Evidence that B. and his ancestors had for fifty-six years maintained a partition fence between his land and another's, and that said fence was an old one fifty-six years ago, and B.'s ancestor, then owning the land, said that such fence had always been maintained by himself and his ancestors, was held sufficient proof of a prescriptive obligation on B. to maintain it. *Binney v. Hull*, 5 Pick. 503. And this obligation was not terminated by B.'s becoming a tenant in common of the adjoining land. *Id.*

<sup>3</sup> *Holladay v. Marsh*, 3 Wend. 142.

<sup>4</sup> *Newell v. Hill*, 2 Met. 180. If one places a fence over the line, the owner of the other property may lawfully remove it. *Thayer v. Wright*, 4 Den. 180.

land, whether he be a landlord or tenant, is his own judge not only of the propriety of building on it, or leaving it vacant, but also, when he does build, of the manner and extent of building. In the absence of statutory provisions, he may build with what material he pleases, and is under no obligation of giving his neighbor the use or advantage of his land, by way of support or easement of any description. If a stranger enters upon his unoccupied land, erects buildings, or makes permanent improvements upon it, he is not obliged to recompense him for any portion of the expense of improvement on recovering possession of the land. And if the stranger, under these circumstances, should undertake to remove such buildings from the land before the owner recovers possession, he is liable in trespass for their value.<sup>1</sup>

§ 188. *Division-walls, separate Ownership in. — Party-walls.* — Neither is there any obligation upon the proprietors of adjoining building-lots in a city, to unite in building a *party-wall* on the dividing line of such lots. The common use of a wall adjoining lands belonging to different owners is *prima facie* evidence that the wall and the land on which it stands belong to the owners of those adjoining lands in equal moieties as tenants in common.<sup>2</sup> But if the precise extent of land originally belonging to each can be ascertained, the presumption of a tenancy in common does not arise, and each party is the owner of so much of the wall as stands upon his own land.<sup>3</sup> If a man inserts the beams of his house in his neighbor's wall without permission, it does not thereby become a party-wall, for the owner may pull it down, or sue for a tres-

<sup>1</sup> Moore v. Cable, 1 Johns. Ch. 385; Gillet v. Maynard, 5 Johns. 85; Dewey v. Osborn, 4 Cow. 329; Erwin v. Olmsted, 7 id. 229. No one but the adjoining owner or possessor has any interest in the duty or obligation of another to build or maintain a division fence; and the omission to do so, though the want of the fence results in injury to a third person, gives him no ground of action. Bronk v. Becker, 17 Wend. 320; Ricketts v. E. & W. Ind. Docks Co., 12 C. B. 160; Ryan v. Roch. & S. R. R., 9 How. Pr. R. 453.

<sup>2</sup> Cubitt v. Porter, 8 B. & C. 257.

<sup>3</sup> Ogden v. Jones, 2 Bosw. 685; McConnell v. Kibbee, 83 Ill. 175; Peyton v. Mayor, 9 B. & C. 725.

pass.<sup>1</sup> A *party-wall* is properly that which is built on the common property of two owners of adjoining tenements, at their joint expense, each one continuing owner of his land with an easement in or right to use the wall for the mutual support of their respective buildings. The statute relating to party-walls does not make them, nor the land on which they stand, common property: each one owns in severalty the portion of wall standing on his own land, with no qualification, except that neither has a right to pull the wall down, so long as it remains sound, without the consent of the other.<sup>2</sup> But this observation applies only to a wall which is admitted to be a party-wall; for if one of two adjoining owners places half of a wall on the adjoining lot without an agreement that it shall be built at the joint expense, the owner of the latter is not liable to contribute towards the expense of the wall, even if he subsequently uses that part of it which stands upon his own land.<sup>3</sup> A division wall may, however, become a party-wall by agreement either express or implied; for although such a wall may have been built exclusively upon the land of one, if it has been enjoyed in common by the owners of both houses for a period of twenty years, the law will presume, in the absence of evidence to the contrary, that such use and enjoyment were permissive, and with an understanding that the wall should become a party-wall.<sup>4</sup> If such a wall is casually destroyed, or becomes ruinous, there is no obligation resting upon either owner as against the other to rebuild it, or to unite in building another.<sup>5</sup> But the owners of a party-wall

<sup>1</sup> *Roberts v. White*, *supra*; nor is a license to make a window in such a wall, a justification of the act of inserting the beams. *Id.* If a common wall is erected by tenants for years, though it may be a party-wall as between themselves, it will not create an easement binding upon the owner of the reversion in fee. *Webster v. Stevens*, 5 Duer, 553.

<sup>2</sup> *Joy v. Bost. Penny Sav. Bk.*, 115 Mass. 60; *Ingals v. Plamondon*, 75 Ill. 118; *Fettretch v. Leamy*, 9 Bosw. 510.

<sup>3</sup> *Roberts v. White*, *supra*; *Stockwell v. Hunter*, 11 Met. 445.

<sup>4</sup> *Brown v. Werner*, 40 Md. 15.

<sup>5</sup> *Sherred v. Cisco*, 4 Sandf. 480. In this case a party-wall had been built at joint expense, and was destroyed by fire, and the owner of one of the lots proceeded, without the concurrence of the owner of the other, to build a new wall on the site of the old one. The owner of the other lot subsequently built on his lot, and rested his beams in the new wall; and

dividing their two lots are jointly liable for injuries sustained in consequence of its falling through decay and want of repair.<sup>1</sup>

§ 189. **Respective Rights as to Party-walls.** — So a wall may be a party-wall for a portion of its length or height, and an external wall for the residue of its length or height.<sup>2</sup> Either owner has also a right to increase the height of a party-wall if it can be done, without detriment to the strength of the wall, or to the property of the adjoining owner. But he makes such addition at his peril.<sup>3</sup> And if one proprietor adds to the height of a party-wall, and the other pulls down the addition, the former may maintain trespass against the other for pulling down so much of it as stood on the half of the wall which was erected on the plaintiff's soil.<sup>4</sup> If either pulls down a ruinous party-wall, for the purpose of rebuilding, he is bound to reinstate it in a reasonable time, and with the least inconvenience. If it was necessary to repair the old wall, the neighbor, although bound to contribute ratably to the expense of the new wall, is not bound to contribute towards building it higher than the old one, nor with more costly material: all

he was justified by the court in doing so, although he had not contributed to the expense of erecting such wall.

<sup>1</sup> *Klauder v. McGrath*, 35 Pa. St. 128.

<sup>2</sup> *Weston v. Arnold*, 22 W. R. 284; 43 L. J. Ch. 123. When a wall for a few feet from the ground is the dividing wall between two houses, and above that is the outside wall of one of them, the lower part may be a party-wall, but the other part is not. *Id.*

<sup>3</sup> *Brooks v. Curtis*, 50 N. Y. 639.

<sup>4</sup> *Matts v. Hawkins*, 5 Taunt. 20; and see *Bradbee v. Christ's Hosp.*, 4 M. & G. 714. The maxim that *qui tacet consentire videtur* was applied in an action to recover the value of one half of a party-wall, the defendant having reason to know that the plaintiff was erecting the wall with an expectation of payment for such value, and allowing him so to act without objection, in *Day v. Caton*, 119 Mass. 513. An agreement for a party-wall was held not to prohibit the extension of a building beyond it, in front and in the rear. *Wolfe v. Frost*, 4 Sandf. Ch. 72. An agreement between adjoining owners, that one may insert the beams of his building into the other's wall, and pay for the privilege of doing so, is a mere license, without any interest in the land, and need not be in writing. *McLarney v. Pettigrew*, 3 E. D. Smith, 111; *Miller v. Aub. & Sy. R. R.*, 6 Hill, 61; *Pierpont v. Barnard*, 6 N. Y. 279.

such extra expense must be borne exclusively by him who pulls down and rebuilds.<sup>1</sup> But if he takes it down and rebuilds when it was in a sound condition and sufficient for the purpose for which it was erected, without the consent of the other, he not only forfeits all claim to contribution from him, but makes himself liable for any damage that may be sustained from loss of rent, or necessary repairs.<sup>2</sup> Whether it was necessary to take down and rebuild the wall is always a question for a jury; but, supposing it to be necessary and that the work is done with proper skill and caution, the right of an owner of a building to take down a decayed and ruinous party-wall, for the purpose of rebuilding, after reasonable notice to the tenant of the adjoining building, is unquestioned, nor is that right affected by the nature of the use and occupation of the adjoining building.<sup>3</sup>

§ 190. **Easements to use Walls.**—The right to use an ancient wall, in support of an adjoining building, stands upon a different footing.<sup>4</sup> If it was not strictly a party-wall, and the walls of the house pulled down stood wholly on its own lot, yet if the beams of the other house rested upon the wall pulled down, and had done so for a period of time sufficient to establish an easement by prescription, the owner of the adjoining house would be entitled to have his beams inserted,

<sup>1</sup> *Campbell v. Mesier*, 4 Johns. Ch. 334; s. c. 6 *id.* 21; *Weld v. Nichols*, 17 Pick. 538. The co-tenant is not liable for the expense of such improvements as are not necessary repairs, made in the absence of a contract express or implied; and no contract will be implied from the mere fact that the improvements were beneficial. *Taylor v. Baldwin*, 10 Barb. 626; *Mumford v. Brown*, 6 Cow. 475; *Putnam v. Ritchie*, 6 Paige, 405.

<sup>2</sup> *Potter v. White*, 6 Bos. 644.

<sup>3</sup> *Partridge v. Gilbert*, 3 Duer, 184; s. c. 15 N. Y. 601. Held otherwise where the plaintiff was a lessee, with a covenant for quiet enjoyment. *Armstrong v. Schermerhorn*, 2 N. Y. Leg. Obs. 40. In New York, Philadelphia, Washington, and other cities, party-walls and buildings are specially regulated by statute. As to the effect of a city custom on this subject, see *Bradbee v. Christ's Hosp.*, 4 M. & G. 714.

<sup>4</sup> An ancient wall is one that was built to be used, and has in fact been used, as a party-wall for more than twenty years, by the express permission and continuous acquiescence of the owners of the land on which it stands. *Eno v. Del Vecchio*, 4 Duer, 58, 63.

for a resting-place, in the new wall.<sup>1</sup> But, with respect to a partition wall which is erected partly on each lot, for the purpose of supporting both buildings, each of the owners has an easement in it, for the support of his own house. Neither of them has any right to remove or underpin it, either partially or wholly, unless it can be done without injury to the other's house. And if the owner of two adjoining lots erects buildings on them, with a wall standing partly on each, intended to furnish a support to both buildings, and which has been used for such a purpose, and then makes a conveyance of either house and lot with its appurtenances, he thereby grants an easement for the support of the house conveyed, in so much of the wall as stands on the other lot, and makes it a party-wall. After such a grant, neither can remove the wall, nor so deal with it as to render it an inefficient support for the other's building without his consent. If either wishes to improve his own premises before the wall has become ruinous, or incapable of further answering the purposes for which it was erected, he must do it at his own risk and expense.<sup>2</sup> In all such cases, neither owner nor occupant can interfere with the wall, to the detriment of the other, without his consent. But where a common wall is erected by tenants

<sup>1</sup> 3 Kent's Com. 437. The corporation of the city of New York, by an ordinance of 1833, have regulated partition fences and walls. It requires them to be made and maintained by the owners of the land on each side; and, if the same can be equally divided, each party shall make and keep in repair one-half. Disputes concerning the division of the wall, and the parts to be made and repaired by each, or as to its sufficiency, are to be settled by an alderman or assistant of the ward. If the wall cannot be conveniently divided, it is to be made and kept in repair at the joint expense. So much of the wall as is higher or lower than the city regulation, to be at the individual expense of the owner. And, on neglect of one party to contribute, the other may make the whole wall, and recover from his co-tenant his proportion of the expense.

<sup>2</sup> *Eno v. Del Vecchio*, 4 Duer, 53; s. c. 6 *id.* 17; *Bradbee v. Christ's Hosp*, 4 M. & G. 714; *Hide v. Thornborough*, 2 C. & K. 250. Where the owners of adjoining lots by agreement construct a wall partly on each lot, for the common support of their buildings, the wall so constructed, if used as such for twenty years, becomes a party-wall in the legal sense of the term, and the owner of each house has an easement for its support in that portion of the wall which stands on the adjoining lot.

for years, although it may be a party-wall as between themselves, it will create no easement binding on the owner of the reversion in fee, that can prevent him, when the term expires, from dealing with his property as if no such wall had been erected.<sup>1</sup>

§ 191. **Boundary Trees, Ownership and Rights in.** — As a man may abate an encroachment on his property, he may cut the roots of a tree so encroaching, in the same manner that he may lop its overhanging branches.<sup>2</sup> If the tree grows in a hedge, dividing the land of two persons, with the roots extending into the land of each, they are tenants in common of the tree; but if it stands on my side of the line, and the roots grow in my land, the whole property of the tree is in me, though the boughs overshadow his land; and although my neighbor may have a right to cut away the branches or the roots on his side, he has no right to convert either the branches or the fruit to his own use.<sup>3</sup> And if line trees are destroyed by one of the adjoining proprietors, he is liable to an action of trespass, in favor of the other, whether the interest of such other be several, or that of a tenant in common.<sup>4</sup> A man may, also, justify an entry on his neighbor's land, to retake his own property, which has been removed

<sup>1</sup> Webster v. Stevens, 5 Duer, 553.

<sup>2</sup> Jones v. Powell, Palm. 536. And see Hoffman v. Armstrong, 48 N. Y. 301.

<sup>3</sup> Welch v. Nash, 8 East, 394; Dyson v. Collick, 5 B. & A. 600; Beardslee v. French, 7 Conn. 125; Lyman v. Hale, 11 id. 177. The case of Master v. Pollier was an action "of trespass *quare clausum fregit et asportavit* the plaintiff's boards. The defendant justified, that there was a great tree which grew between the close of the plaintiff and that of the defendant, and that part of the roots of the tree entered into the close of the defendant, and were nourished by his soil; that the plaintiff cut down the tree, carried it into his own close, and sawed it into boards, and the defendant entered, and took and carried away some of the boards *prout ei bene licuit*. On demurrer to the plea, it was contended to be bad; for, although some of the roots of the tree are in the defendant's soil, yet the body of the tree being in the plaintiff's soil, all the residue of the tree belongs to him also. And of this opinion is Bracton; but if the plaintiff had planted a tree in the soil of the defendant, it shall be otherwise *quod curia concessit*." Rolle, 114. See also Betts v. Lee, 5 Johns. 348.

<sup>4</sup> Dubois v. Beaver, 25 N. Y. 123.



thither by accident. As in the instance of fruit falling upon the ground of another; or in that of a tree which is blown down, or through decay falls upon the ground of a neighbor; in which cases the owner of the fruit, or of the tree, may show the nature of the accident, and that he was not responsible for it, and thus justify the entry. If, however, the fruit, or the tree, had fallen in that particular direction, in consequence of the owner's wilful act, or negligence, he could not justify the entry.<sup>1</sup>

## SECTION IV.

### LIABILITY FOR NEGLIGENCE.

§ 192. **Tenant's Duty to Strangers.**—The tenant's general obligation to repair, and so to use and manage the property in his possession that others shall receive no injury therefrom, is co-extensive with that of every other occupant of fixed property, rendering him liable to respond for any injury that may be sustained by his neglect to guard against its want of safety or any reckless management thereof,<sup>2</sup>—as, by not keeping the area in front of his house fenced, or the covers of his vaults sufficiently closed, so that a person walking along in the street falls through and is injured. And where he directs his servant to remove snow or ice from the roof of his house, which he does by negligently throwing it into the street, he becomes liable for any injury that may be received by a passenger therefrom, whether the negligence was that of the servant or of some one whom the servant employed or requested to assist him.<sup>3</sup> If he maintains a sink or vault upon his premises, from

<sup>1</sup> Per Tindall, C. J., in *Anthony v. Haney*, 8 Bing. 192.

<sup>2</sup> *Feital v. Midd. R. R.*, 109 Mass. 398. It was here held that a railroad company lessee was liable for injuring a passenger, though the lease was illegal and void, as it was in actual possession and use of the tract without objection from the owner.

<sup>3</sup> *Althorf v. Wolfe*, 22 N. Y. 366; *Blake v. Ferris*, 5 *id.* 48; *Cheatham v. Hampson*, 2 T. R. 318; *Chicago v. Robbins*, 2 Black, 418; *Randleson v. Murray*, 8 Ad. & E. 109.



which filthy water filters upon the land of his neighbor, and injures a cellar or well, he becomes liable in damages for the injury without other proof of negligence.<sup>1</sup> If he repairs or improves the building, he must guard against accidents to the passers-by in the street, by erecting a suitable barricade, or stationing a person there to give notice of danger.<sup>2</sup> It is also held in New York that any one who makes an excavation under or along the highway remains responsible for any injury from the defective condition of the coverings thereof.<sup>3</sup> In so far as this liability is continued, notwithstanding a demise of the premises, the doctrine does not seem to be elsewhere accepted.<sup>4</sup> With reference to persons resorting to his premises, or upon his invitation express or implied, every tenant is bound to exercise reasonable care to prevent damage happening to them from any danger in the construction of the buildings, which he knows of or has reason to apprehend.<sup>5</sup> The keeper of a public-house was accordingly charged with negligence in not sufficiently protecting the plaintiff, who visited the house as a guest, from a weakness in the floor through which he fell and was hurt.<sup>6</sup> But where in going along a dark passage the plaintiff fell down an ordinary stairway, he was not allowed to recover any damages, for he ought to have taken a light with him; and that the defendant's servant directed the plaintiff to go where he did made no difference.<sup>7</sup>

<sup>1</sup> *Ball v. Nye*, 99 Mass. 582.

<sup>2</sup> *Sexton v. Zett*, 44 N. Y. 430. Applied to the case of post-holes for a fence dug on the line of the street. *Wright & Saunders*, 65 Barb. 214.

<sup>3</sup> *Congreve v. Smith*, 18 N. Y. 79, and other cases, *ante*, § 175.

<sup>4</sup> *Ib.*

<sup>5</sup> *Phil. R. R. Co. v. Kerr*, 25 Md. 521; *Carlton v. Franc. Iron Co.*, 99 Mass. 216; *Chapman v. Rothwell*, El. B. & E. 168; *Indermaur v. Dames*, 1 Harr. & R. 243, affirmed on appeal, L. R. 2 C. P. 311, and holding that if the premises are in any respect dangerous, he must give his visitors sufficient warning thereof to enable them by the use of due care to avoid it.

<sup>6</sup> *Axford v. Prior*, 14 W. R. 611.

<sup>7</sup> *Wilkinson v. Fairrie*, 1 Hurlst. & C. 633. As to the liability of the keeper of a tavern to persons coming there without dealing with him, see *Axford v. Prior*, *supra*.

§ 193. **Liability of Owners of Structures, etc.**—For a similar reason one who causes a building to be erected for a public exhibition, and admits persons to a seat therein on the payment of money, is bound to see that due care has been taken in its erection, and that it is reasonably fit for the purpose; and it is immaterial whether the money is to be appropriated to his own use or not.<sup>1</sup> It is the duty of a wharfinger also to give information as to inequalities in the surface of the bottom when that is material to the safety of the vessel about to moor at his wharf; but he is not bound to maintain a depth of water in the berth at his wharf sufficient for all vessels at all tides. Nor is the master of the ship relieved from the responsibility of ascertaining before he places his vessel in a berth, whether the depth of water is sufficient for the draught of his vessel.<sup>2</sup> And the owner of dangerous machinery who leaves it in an open place, though on his own land, where he has reason to believe that children will be attracted to play with it, and be injured, is bound to reasonable care to protect such children from the danger to which they are thus exposed.<sup>3</sup> A master

<sup>1</sup> *Francis v. Cockrell*, L. R. 5 Q. B. 501, s. c. affirmed *id.* 184. In an action against the proprietors of a public exhibition, for not properly maintaining a staircase, which fell and injured the plaintiff, who had paid for his admission, there having been alterations which caused the fall, it was left to the jury to say whether the proprietors had employed proper persons to make the alterations, and whether those persons had used proper care and skill. *Brazier v. Polytechnic Inst.* 1 F. & F. 517. Where a sign of "no admittance" is placed on the door, one who enters cannot recover for an injury caused by negligence in the management of the room, even though no further warning was given. *Zoebisich v. Tarbell*, 10 Allen, 385. The court in New York has laid down the rule that the landlord of a structure erected for a public purpose is not liable to injuries resulting from the defective condition of the building, to third persons lawfully going upon the premises, unless the landlord has wilfully concealed the defects. *Edwards v. N. Y. & H. R. R. Co.*, 98 N. Y. 245, (Ruger, C. J., Danforth & Finch, JJ., dissenting); and see *Bard v. Same*, 10 Daly, 520; § 175, *ante*.

<sup>2</sup> *Nelson v. Phoenix Chem. Works*, 7 Ben. 37.

<sup>3</sup> *Keefe v. Milw. Co.*, 21 Minn. 207. The owner of a private way through a lumber-yard is not liable for injuries received from the falling of a pile of lumber upon children who were trespassers there, the owner having ordered all children to be driven off, and employed a proper person to carry out his orders. *Vanderbeck v. Hendrey*, 34 N. J. 467.

may also be made responsible to his servant for injuries received from defects in the building in which the services were rendered, and which the master knew or ought to have known and guarded against.<sup>1</sup> But notwithstanding a landlord may be liable for an unsafe condition of the premises, the tenant will not be thereby absolved from his responsibility to third persons, for a neglect to make such repairs as are incumbent upon him.<sup>2</sup>

§ 194. **To Intruders and Trespassers.** — The responsibility for injuries resulting from negligence, however, does not extend to such persons as are on the premises unlawfully, or without permission, and the proprietor is therefore under no obligation to make it safe for their access. As where the owner of several lots, upon the rear of which were tenements, commenced to build upon their front, and opened a way through an adjoining lot for his tenants, of which he notified them; it was held that a visitor who, in attempting to enter the tenements, passed into the unfinished buildings in the night-time, and fell through the floor and was injured, could not recover for such injuries.<sup>3</sup> But a person who is injured by the negligence of another is not barred of his remedy by the fact that at the time of the injury he was trespassing upon the premises of the person injuring him, if his trespass does not involve negligence on his own part substantially contributing to produce the injury.<sup>4</sup> Or if the negligence of the

<sup>1</sup> *Ryan v. Fowler*, 24 N. Y. 410. But not for the explosion of a kitchen boiler, properly constructed, simply because it had no safety-valve. *Jaffe v. Harteau*, 56 N. Y. 398.

<sup>2</sup> *Whalen v. Gloucester*, 6 Thomp. & C. 135; *Radway v. Briggs*, 37 N. Y. 256. Where a husband and wife live upon premises, the separate property of the latter, the former is not in legal presumption so in control thereof as to make him liable for injuries sustained by the careless leaving of a pit uncovered thereon, and in order to make him jointly or severally responsible, some evidence must be given of his participation in the wrong, or of an obligation on his part to obviate the cause of the injury. *Fiske v. Bailey*, 51 N. Y. 150.

<sup>3</sup> *Roulston v. Clark*, 3 E. D. Smith, 366.

<sup>4</sup> *Daley v. Norwich Co.*, 26 Conn. 591; *Norris v. Litchfield*, 35 N. H. 271.

defendant is so gross and wilful as to imply a disregard of consequences, or a design to inflict an injury, the plaintiff may recover, though he was a trespasser, or did not exercise ordinary care to avoid the injury.<sup>1</sup>

§ 194 *a*. **For illegal and dangerous Acts.** — Where that which is done by a person on his own land is illegal and punishable as such; or though not illegal, if it be an act which may probably endanger human life, as the setting of dangerous traps or spring guns, he may be responsible even to a trespasser, for injuries thus sustained by him.<sup>2</sup> But although such traps or guns may be lawfully placed upon private grounds, for the purpose of deterring trespassers, or preventing strange animals from doing damage, yet full notice must be given of the fact; and if no notice, or an insufficient notice, is given, the person so placing them is responsible for all injuries done by them to any human being, although he may have been a trespasser.<sup>3</sup> And where the plaintiff had notice that deadly engines were placed in a wood into which he notwithstanding entered, and was severely wounded, it was held that he could not maintain an action, having voluntarily brought the injury upon himself.<sup>4</sup>

§ 195. **For Injuries done by Animals.** — The liability of an owner or keeper of animals of any description, for injuries committed by them, is also founded upon his actual or presumed negligence to take sufficient care to prevent their doing such injuries.<sup>5</sup> Upon this principle, he is liable in damages for keeping a dog upon his premises which is accustomed to bite mankind; and even if it is not his, he is still liable if he harbors or allows it to be at, and resort to, his premises.<sup>6</sup> But he must be aware that the dog was a ferocious animal,

<sup>1</sup> *Lafayette R. R. Co. v. Adams*, 26 Ind. 370; *Clark v. Kirwan*, *supra*.

<sup>2</sup> *Bird v. Holbrook*, 4 Bing. 628; *Jordin v. Crump*, 8 M. & W. 782.

<sup>3</sup> *Bird v. Holbrook*, *supra*; *Townsend v. Watken*, 9 East, 277.

<sup>4</sup> *Ilott v. Wilks*, 3 B. & A. 304.

<sup>5</sup> *Buckley v. Leonard*, 4 Den. 500; *Meredith v. Reed*, 26 Ind. 334.

<sup>6</sup> *Sarch v. Blackburn*, 4 C. & P. 292; *Curtis v. Mills*, 5 *id.* 489.

and accustomed to bite;<sup>1</sup> and he will be exonerated from all responsibility, if, being a strange dog, he has endeavored, but without success, to drive it off from his premises.<sup>2</sup> A man cannot, however, recover damages for an injury received from the bite of a dog placed in a yard for the protection of out-houses, unless he had such reasonable and justifiable cause for being in the place where the dog was, as might be pleaded in answer to an action of trespass; as, if he was in the pursuit of his ordinary business at the time. And if he was lawfully upon the premises, the circumstance of there being a notice posted up, warning persons to beware of the dog, will be no answer to a claim for damages, if it appears that he was not able to read it.<sup>3</sup> So a warning, previously given, is no excuse, if the jury should think that the accident was not occasioned by the plaintiff's own carelessness or want of caution.<sup>4</sup> The owner of sheep, however, which had been worried by a dog in a field, is not justified in shooting the dog, when in another field and at some distance off; as it cannot then be said to have been done in the protection of his property.<sup>5</sup>

<sup>1</sup> *Woolf v. Chalker*, 31 Conn. 121; *Kitteridge v. Elliott*, 16 N. H. 77; *Cogswell v. Baldwin*, 15 Vt. 404; *Stumps v. Kelley*, 22 Ill. 140; *McKone v. Wood*, 5 C. & P. 1; *Hogan v. Sharpe*, 7 *id.* 755; *Jenkins v. Turner*, 1 Ld. Ray. 109; *Rex v. Huggins*, 2 *id.* 1583; *Van Leuven v. Lyke*, 1 N. Y. 515; *Laverone v. Mangianti*, 41 Cal. 138; *Wheeler v. Brant*, 23 Barb. 324. In Massachusetts and in Maine, the keeper of a dog is by statute made responsible for all his wrongful acts.

<sup>2</sup> *Smith v. Great E. R. R. Co.*, L. R. 2 C. P. 4; *Hewes v. McNamara*, 106 Mass. 281.

<sup>3</sup> *Sarch v. Blackburn*, *supra*; s. c. Mood. & M. 505; *Blackman v. Simmons*, 3 C. & P. 138; *Howland v. Vincent*, 10 Met. 371. A mere technical trespass upon the premises by the plaintiff at the time is no defence to an action for an injury received from a vicious dog. *Loomis v. Terry*, 17 Wend. 476; *Sherfey v. Bartley*, 4 Sneed, 5.

<sup>4</sup> *Curtis v. Mills*, *supra*. In the cases of *May v. Burdett*, 9 Q. B. 101, and *Jackson v. Smithson*, 15 M. & W. 563, the judges held that the keeper of any mischievous animal dangerous to his neighbor is bound to keep it securely at his peril; and, if any injury is done by it, negligence in the owner is presumed to have been the cause of the injury; for that there is negligence in keeping it, after notice of its propensities.

<sup>5</sup> *Wells v. Head*, 4 C. & P. 568; *McAneany v. Jewett*, 10 Allen, 151. A ferocious dog, that attacks persons, is a nuisance; and, if allowed to

The plaintiff, wherever it is necessary to prove a *scienter*, as in the case of a dog, must allege that the defendant knew that the dog was accustomed to commit the particular tort complained of; an allegation of a knowledge of general ferocity is not, it would seem, sufficient to charge the defendant.<sup>1</sup>

§ 196. **For Fires beginning on the Premises.** — At common law, if a fire began in a dwelling-house, and it extended to the neighboring property, the tenant of the house where the fire originated was responsible for all damages done, whether the fire was caused by the mischance of himself, his servant, or his guest.<sup>2</sup> But a statute of Queen Anne, amended by the statute of 14 Geo. III. c. 78, enacted that no action should be had against any person, in whose house, chamber, or other building, or on whose estate, any fire should accidentally begin; and this statute has been generally re-enacted in the United States. The protection afforded by these statutes, however, extends only to a case of accidental fire, that is, one which cannot be traced to any particular or wilful cause, and stands opposed to the negligence of either servants or masters; and therefore an action will lie against a person upon whose premises a fire commences, through the negligence or misconduct of himself or his servants, which is productive of injury to the adjacent property of his neighbor.<sup>3</sup> And it is imma-

run at large may be killed by any one. *Putnam v. Payne*, 13 Johns. 312; *Hinckley v. Emerson*, 4 Cow. 351.

<sup>1</sup> *Hogan v. Sharp*, 7 C. & P. 755; *Hartley v. Harriman*, 1 B. & A. 620; *Beck v. Dyson*, 4 Camp. 198; *Jackson v. Pesked*, 1 M. & S. 238.

<sup>2</sup> “*Si mon feu per misfortune arde les biens d’ autre home, il avera action sur le case vers moy.* — 2 Hen. IV. 18.” Roll. Abr. Action on Case, B. p. 1; *Tubervil v. Stamp*, 1 Salk. 13. The Revised Statutes of New York (1 R. S. 696, § 1) also provide that any person negligently setting fire to his own woods, or negligently suffering a fire kindled upon his own wood or fallow land, to extend beyond his own land, shall forfeit treble damages to the party injured thereby. *Lawyer v. Smith*, 1 Den. 207.

<sup>3</sup> *Filliter v. Phippard*, 11 Ad. & E. Q. B. 347; *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420. The fire in this case was kindled at a time of extreme drouth, and a strong wind was blowing from the land of the defendant towards the adjoining woodland of the plaintiff. A tenant is not liable, in the absence of an express agreement, for the accidental de-

terial whether the proof shows gross negligence, or only a want of ordinary care, for in either case the plaintiff is entitled to recover whatever damage he has sustained.<sup>1</sup> But the negligent burning of a house, and the spreading of the fire to a neighboring house which is not adjacent to that in which the fire originated, do not give the owner of that house a right of action for the damages he may sustain, since they are the remote and not the immediate results of the defendant's acts.<sup>2</sup> A tenant also is answerable to his lessor, if the house or other building on the demised premises is destroyed by fire, through his carelessness or negligence; and in such case he is bound to rebuild, at his own expense, within a reasonable time.<sup>3</sup> And when an occupant of land sets fire to the fallow or wood thereon for the purpose of improving it, or bringing it into cultivation, and unwittingly injures his neighbor, he will be answerable for the damage, unless it appears that he had used due care to prevent such injury. And where an action was brought by the plaintiff for an injury to his reversion, occasioned by the defendant's making a rick of hay on his land, so near to some cottages of the plaintiff that they were burned by the spontaneous ignition of the hay; and it was proved that the hay had been put up in a damp or green condition, when, as is well known, it will, from natural causes, ferment

struction by fire of the buildings occupied by him. *Wainscott v. Silvers*, 13 Ind. 497.

<sup>1</sup> *Barnard v. Poor*, 21 Pick. 378; *Todd v. Collins*, 1 Halst. 127.

<sup>2</sup> *Ryan v. N. Y. Cent. R. R.*, 35 N. Y. 210; *Penn. R. R. Co. v. Kerr*, 62 Pa. St. 353.

<sup>3</sup> *Co. Lit.* 53 b; *Rook v. Warth*, 1 Ves. Sr. 462. In the case of *Clark v. Foot*, 8 Johns. 421, Clark sued Foot to recover damages sustained by Foot's setting fire to the plaintiff's woods. The evidence was that the defendant's servant by defendant's order, set fire to certain fallow ground belonging to the defendant, which fire ran into the plaintiff's woodland. The court said the question was whether there was negligence on the part of Foot or his agent; for Foot was as much accountable for the negligence of his servant, whilst employed in his business, as if the fire had spread by his own act. It is lawful for a person to burn his fallow; but, if his neighbor is injured thereby, he will have a remedy by action on the case, if there be sufficient ground to impute the act to the negligence or misconduct of the defendant or his servants. See also *Maull v. Wilson*, 2 Harringt. 443.



and ignite, the court held, that the law requires every man so to use his own property as not to injure or destroy that of his neighbor, and rendered him liable for all consequences resulting from a want of due care and caution in the manner of enjoying his own rights; and that in this case an ordinary degree of prudence would have prevented the accident, or suggested the propriety of placing his hay-ricks further off from his neighbor's premises.<sup>1</sup>

§ 197. **For Acts not in themselves Unlawful.** — It is a sound legal maxim, that requires every person to exercise his own rights so as not to injure those of his neighbor; wherefore, a person acting in the exercise of his undoubted right of property, and doing damage to his neighbor, which, under other circumstances, might be justifiable, will still be liable to an action, if the damage might have been prevented by the use of reasonable care and precaution. English law seems to have gone to the extent of making a man liable for damages, even when caused by a mere casualty which could not be avoided; regarding not so much the intent of the actor as the loss and damage of the party suffering, holding that he who receives damage ought in any event to be recompensed. As if, in building his house, a piece of timber accidentally falls on the neighboring house, and injures it; or if a man assaults him, and, in lifting up his staff to defend himself, it strikes

<sup>1</sup> *Sutton v. Clarke*, 6 Taunt. 44; *Cook v. Champl. Tr. Co.*, 1 Den. 91. In *Hanlon v. Ingram*, 3 Iowa, 81, Wright, C. J., says: "All of the circumstances should be carefully weighed, and unless they disclose with reasonable certainty that in setting out the fire, and preventing its escape, the defendant has used those precautionary measures which, as a prudent and cautious man, he would take with reference to his own property, he will be liable." And see *Jordan v. Wyatt*, 4 Gratt. 151. Plaintiff's wood was on the defendant's land, and defendant having given plaintiff a reasonable notice of his intention, and requiring him to remove it, set fire to his fallow, and the wood still remaining upon the land was burned; and the defendant was held not to be liable for any damages, in the absence of wilful wrong or gross negligence. *Bennett v. Scutt*, 18 Barb. 347. In case of damage from burning fallow, the mere fact that the fire was set in a dry time, in July, upon low swampy ground, previously burnt over and destitute of brush, does not show negligence. *Stuart v. Hawley*, 22 Barb. 619.



another, although he did a lawful thing.<sup>1</sup> But American authorities have not gone so far, and have invariably held that no liability results from the commission of an act which is purely accidental, or which ordinary human care and foresight could not have guarded against.<sup>2</sup> They have never, however, excused carelessness, or a neglect to take such precautions against injury as a man of ordinary prudence usually takes in his own affairs. Thus a shop-keeper, who invites the public to his shop, is held liable for neglect on leaving a trap-door open, without sufficient protection, by which his customers suffer injury.<sup>3</sup> A livery-stable keeper who lets horses and carriages for hire is answerable for injuries which happen by reason of defects in carriages which might have been discovered by a careful examination.<sup>4</sup>

§ 198. **Owner bound to Reasonable Care.** — Wherever, from the situation of the premises, the acts of a person though done entirely on his own property may be productive of injury to another, he is bound to exercise such a degree of care and caution as shall enable other persons, exercising reasonable care on their part also, to avoid the danger. But if he has used such caution, he will not be liable for an injury arising from the interference of a wrong-doer. Thus, in an action for negligently permitting the flap of the defendant's cellar to remain unfastened, whereby it fell upon and broke the

<sup>1</sup> *Vaughan v. Menlove*, 3 Bing. (N. C.) 468. See also *Rex v. Comm'rs*, 8 B. & C. 355; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Aldridge v. Great West. R. R.* 4 Scott, N. R. 156.

<sup>2</sup> *Dygert v. Bradley*, 8 Wend. 469; *Taylor v. Atlantic Ins. Co.*, 9 Bosw. 369; *Brown v. Kendall*, 6 Cush. 292. And per Earl, J., in *Losee v. Buchanan*, 51 N. Y. 491: "The rule, so far as I can discern, has no exception in this country that no one can be made liable for injuries to the person or property of another, without some fault or negligence on his part, however serious the injury may be which is accidentally inflicted." See also *Calkins v. Berger*, 44 Barb. 424; *McGrew v. Stone*, 53 Pa. St. 436; *Lawler v. Baring Boom Co.*, 56 Me. 448.

<sup>3</sup> *Parnaby v. Lancaster Coal Co.*, 11 Ad. & E. 223-243; *Freer v. Cameron*, 4 Rich. Law, 218. In *Karl v. Maillard*, 3 Bosw. 591, it was held culpable negligence to have an open unguarded hoistway within six feet of the entrance to a building.

<sup>4</sup> *Hadley v. Cross*, 34 Vt. 586.

plaintiff's legs, it was held that the defendant was bound to exercise ordinary care in securing it, that what this was should be determined by the condition of the owner and other circumstances; but that he was not responsible for the act of a wrong-doer in displacing it.<sup>1</sup> A like decision was made in a later case and the test of liability was the want of ordinary care by the defendant.<sup>2</sup>

§ 199. **Care to be proportioned to Danger. — Rule of Contributory Negligence.** — With respect to the degree of care which is necessary to be taken by persons who would avoid liability in cases of damage arising from casualties of the character we have been considering, it is in general that which persons of ordinary prudence are presumed to make use of under similar circumstances to avoid injury, and should always be proportioned to the injury to be avoided and to the consequences involved in its neglect.<sup>3</sup> But where there is equal negligence on both sides, without any intentional wrong on the part of either, or if the plaintiff, by his own negligence or otherwise, has contributed, substantially, to produce the injury complained of, no action lies.<sup>4</sup> A party, on the one

<sup>1</sup> *Daniels v. Potter*, 4 C. & P. 262. Negligence is defined to be any violation of the obligation which enjoins care and caution in what we do. It is the omission of a duty. *Tonawanda R. R. v. Munger*, 5 Den. 255; *Carroll v. N. Y. & N. H. R. R.*, 1 Duer, 571, 588. And see *Mayor v. Bailey*, 2 Den. 433; *Brand v. Schenect. & T. R. R.*, 8 Barb. 368; *Chase v. N. Y. Cent. R. R.* 24 *id.* 273.

<sup>2</sup> *Proctor v. Harris*, 4 C. & P. 337; *Smith v. Smith*, 2 Pick. 621; *Grant v. Ludlow*, 8 Ohio St. 1. *Ordinary care* means that care and foresight which men of ordinary prudence are accustomed to make use of; *Johnson v. Huds. Riv. R. R.*, 6 Duer, 633; while *ordinary neglect* is the omission of that care which every man of common prudence takes of his own concerns: *Scott v. De Peyster*, 1 Edw. 513. The term negligence embraces acts of omission as well as of commission, and it is the want of that care which a man of common prudence exercises in business matters. *O'Brien v. R. R. Co.*, 3 Phila. 76; *Bizzell v. Baker*, 16 Ark. 308. *Johnson v. Huds Riv. R. R. Co.*, 20 N. Y. 65.

<sup>3</sup> *Toledo R. R. Co. v. Goddard*, 25 Ind. 185; *Ernst v. Huds Riv. R. R. Co.*, 35 N. Y. 9; *Fallon v. Boston*, 3 Allen, 38; *Unger v. Forty-Second St. R. R. Co.*, 51 N. Y. 497; *Heathcock v. Pennington*, 11 Ired. 640.

<sup>4</sup> *Brownell v. Flagler*, 5 Hill, 282; *Wilds v. Huds. Riv. R. R.*, 24 N. Y. 430; *Sills v. Brown*, 9 C. & P. 605; *Wynn v. Allard*, 5 W. & S. 524;

hand, cannot recover damages for an injury which he has brought upon himself, neither will he, on the other, be permitted to shield himself from an injury which he has done, because the injured party was in the wrong, unless such wrong contributed materially to produce the injury; and, even then, it would seem that the party setting up the defence is bound to use ordinary caution to be in the right.<sup>1</sup> If, however, a person, in the lawful use of his property, exposes it to accidental injury from the lawful acts of others, he does not thereby lose his remedy for an injury caused by the culpable negligence of such other persons. The owner of land on the shore of a stream or lake, or adjoining the track of a railroad, may lawfully build thereon, though the situation be one of exposure and hazard; and he is, nevertheless, entitled to protection against the negligent acts of persons passing the same with vessels or carriages propelled by steam-engines, by which such buildings may be set on fire. And, in an action for the damages he may sustain, it is competent for the plaintiff to show that experienced persons, in such employments, were accustomed to use certain precautions which the defendants neglected; the tendency of such evidence not being to estab-

Smith v. Dobson, 3 M. & G. 59; Brown v. Maxwell, 6 Hill, 592; Rathbun v. Payne, 19 Wend. 399. One who complains of another's negligence should himself be without fault. Warner v. N. Y. Cent. R. R. Co., 44 N. Y. 465; Chicago R. R. Co. v. Kauffman, 28 Ill. 513; Noyes v. Morris, 1 Vt. 353; Lane v. Crombie, 12 Pick. 177; State v. Balt. R. R. Co., 24 Md. 84; Drake v. Mount, 33 N. J. 441. Where a plaintiff, at the time of the alleged injury, was trespassing on the defendant, or otherwise wrong in the particular act complained of, such delinquency alone, with very limited exceptions, is a decisive answer to any claim for damages founded on the defendant's negligence. Brownell v. Flagler, *supra*; see Cook v. Champl. Transp. Co., 1 Den. 99; Tonawanda R. R. v. Munger, *supra*; Kelsey v. Barney, 12 N. Y. 425.

<sup>1</sup> N. H. St. & Tr. Co. v. Vanderbilt, 16 Conn. 420. For cases of concurring negligence, see Owen v. Huds. Riv. R. R., 2 Bosw. 374; s. c. 35 N. Y. 56; Indianapolis R. R. Co. v. Wright, 22 Ind. 376; Balt. R. R. Co. v. State, 29 Md. 252. If the plaintiff has used ordinary care, he cannot be said to have contributed to the negligence. Center v. Finney, 17 Barb. 94; Eakin v. Brown, 1 E. D. Smith, 36. That this doctrine is to be cautiously applied, where the fault of the defendant has been clearly established, see Clark v. Kirwan, 4 E. D. Smith, 21.

lish a local law or usage;<sup>1</sup> while a defendant may show that he took all such precautions to guard against injury as would have been taken by a man of ordinary prudence.<sup>2</sup> The question of negligence ought in general to be submitted to a jury, and they are to find whether due care has been used or not;<sup>3</sup> but where the facts are undisputed, the question of contributory negligence becomes one of law for the court.<sup>4</sup>

## SECTION V.

### OF NUISANCES.

§ 200. **Actions for, by Landlord and Tenant.** — The tenant's possessory interest will enable him to maintain actions growing out of any act by which his possession is immediately affected, or the consequences of which are in any way injurious to his possession.<sup>5</sup> And such actions may be either to recover damages for an injury already sustained, or for an injunction to prevent further injury, or both. The injury may be either to the dwelling-house by rendering it uncomfortable or untenable; or to the land, as by overflowing it with water; or to some incorporeal hereditament annexed to the estate, as by the obstruction of a right of way.<sup>6</sup> And, if the injury affects the reversion, both landlord and tenant may have distinct actions for the same wrongful act; as, for an injury to trees the landlord may have an action for injury to the body of the tree, and the tenant in respect to its shade

<sup>1</sup> *Cook v. Champ. Tr. Co.*, 1 Den. 91.

<sup>2</sup> *Furth v. Foster*, 7 Rob. (N. Y.) 484.

<sup>3</sup> *Moore v. Westervelt*, 21 N. Y. 103; *Barton v. N. Y. Cent. R. R. Co.*, 56 *id.* 660; *Hanover R. R. Co. v. Cayle*, 55 Pa. St. 96; *Garland v. Towner*, 55 N. H. 55.

<sup>4</sup> *Morrison v. Erie R. R. Co.*, 56 N. Y. 302; *Ayerigg v. Erie R. R. Co.*, 30 N. J. 460.

<sup>5</sup> *Evans v. Evans*, 2 Camp. 491; *ante*, § 178.

<sup>6</sup> *Trower v. Chadwick*, 3 Bing. (N. C.) 384; *Panton v. Holland*, 17 Johns. 92; *Dodd v. Holme*, 1 Ad. & E. 493; *Thurston v. Hancock*, 12 Mass. 220; *Acton v. Blundell*, 12 M. & W. 324; *Ulrich v. McCabe*, 1 Hilt. 251.

or fruit.<sup>1</sup> If the trees shall have been cut down, the tenant may have an action of trespass against the wrong-doer for breaking in upon his premises, and the landlord an additional action of trover for the trees carried away.<sup>2</sup> An action of trespass also lies in favor of the tenant, if a man builds a house so close to his that the roof overhangs, and throws the water upon it; or if a person erects any thing offensive so near his dwelling as to render it useless or unfit for habitation; as, a pigsty, tobacco-mill, tannery, or privy.<sup>3</sup>

§ 201. **What may Constitute.** — Any offensive erection which, from its nature, may be an annoyance, and from its situation actually becomes so, is a nuisance. A slaughter-house in a city is held to be, *prima facie*, a nuisance to the neighborhood; and, to make it such, it is not necessary that the noxious business should endanger the health of the neighborhood. It is sufficient if it be offensive to the senses, and renders the enjoyment of life uncomfortable.<sup>4</sup> And a coal-

<sup>1</sup> *Bedingfield v. Onslow*, 3 Lev. 209; *Starr v. Jackson*, 11 Mass. 519; *Shadwell v. Hutchinson*, 4 C. & P. 333. But the landlord's remedy is case and not trespass. *Wentworth v. Portsm. & D. R. R.*, 55 N. H. 540.

<sup>2</sup> *Berry v. Heard*, Cro. Car. 242; 2 Inst. 303.

<sup>3</sup> *Aldred's Case*, 9 Co. 59, a; *Penruddock's Case*, 5 *id.* 100; *Wynn v. Alard*, 5 W. & S. 524; *Howel v. McCoy*, 3 Rawle, 256; *Bellows v. Sackett*, 15 Barb. 96; *Whalen v. Keith*, 35 Mo. 87; *Aiken v. Benedict*, 39 Barb. 400; and see *post*, § 775.

<sup>4</sup> *Catlin v. Valentine*, 9 Paige, 575; *State v. Purse*, 4 McCord, 472; *Meigs v. Lister*, 8 C. E. Green, 199. Nuisance, in its largest sense, signifies anything that worketh hurt, inconvenience, or damage. 3 Bl. Com. 215. It is either public, annoying all the members of a community, or it is private, injuriously affecting the lands, tenements, or hereditaments of an individual. *Norcross v. Thoms*, 51 Me. 503; *Coker v. Birge*, 9 Ga. 425. To make a noxious trade a nuisance, it is not necessary that it should endanger the health of the neighborhood. It is sufficient if it produces that degree of annoyance which is offensive to the senses, and impairs the enjoyment of life and property. *Catlin v. Valentine*, *supra*; *Brady v. Weeks*, 3 Barb. 157; *Rex v. Neil*, 2 C. & P. 485. A fat-boiling establishment is a nuisance if it infects the air with noisome smells and gases, prejudicial to health. *Cropsey v. Murphy*, 1 Hilt. 126. So of a livery stable, if it renders a neighboring dwelling-house unfit for the purposes for which it was designed. *Aldrich v. Howard*, 8 R. I. 246; or a lime-kiln, or pottery, in close proximity to the plaintiff's residence.

yard or a stable may be so negligently conducted as to become a nuisance to the neighboring inhabitants, although it is not necessarily a nuisance, and only becomes such by being so carelessly used as to become obnoxious to the neighborhood.<sup>1</sup>

Hutchin v. Smith, 63 Barb. 251; Ross v. Butler, 19 N. J. Eq. 294, a house of prostitution; Jacobowsky v. People, 13 N. Y. 524, a soap-boiling establishment in a city, Howard v. Lee, 3 Sandf. 281; the bleating of calves kept overnight at a slaughter-house, to be killed in the morning, Bishop v. Banks, 33 Conn. 118; a dilapidated sewer, McCarty v. City of Syracuse, 40 N. Y. 194; a bowling-alley kept for gain and common use, where noises at night disturb the neighborhood, State v. Haines, 30 Me. 65; disorderly inns and gambling-houses in places densely populated, Hackney v. State, 8 Ind. 494; State v. Doom, R. M. Charlt. Ga. 1. But maintaining a house for prostitution, or illegal sale of liquors, does not render the house itself, or its inmates or contents, nuisances. Miller v. Forman, 37 N. J. 45; Brown v. Perkins, 12 Gray, 101. A carriage manufactory or a blacksmith's shop may be erected in so improper a place, that its use will result in an injury to a neighbor, and so is, in itself, a wrongful act for which the wrong-doer is responsible to one who is injured thereby. Whitney v. Bartholomew, 21 Conn. 213. So a tomb erected on a man's own land may become a nuisance from its locality and from extrinsic facts. Barnes v. Hathorn, 54 Me. 124. There may be circumstances where the jar and even noise of a steam-engine may become a nuisance, and its use on that account, and in that particular manner, be restrained by the court. Davidson v. Isham, 1 Stark. 186; McKeon v. Lee, 51 N. Y. 300. Whatever is permitted by a statute, which the legislature is competent to enact, is not in judgment of law a nuisance. Leigh v. Westervelt, 2 Duer, 618; Harris v. Thompson, 9 Barb. 350; Plant v. L. I. R. R., 10 id. 26; Williams v. N. Y. C. R. R., 18 Barb. 222. Any excess or irregularity in the exercise of a power conferred by statute, however, may be a nuisance *pro tanto*. Renwick v. Morris, 7 Hill, 575; Adams v. Beach, 6 id. 271. The legislature declared a stream to be a public highway, and afterwards enacted a law authorizing the riparian owners to erect a dam across it; held, that the latter act merely restored the common-law right of the owners to obstruct the navigation, but did not legalize the dam if otherwise a nuisance. Clark v. Mayor, 13 Barb. 32.

<sup>1</sup> Barrow v. Richard, 8 Paige, 351; Russell v. Popham, N. Y. Leg. Obs. 272. Gas-works are not within the ordinary uses of real estate, and, whenever they produce a special injury, are to be regarded as a nuisance, and an action will lie in favor of the injured person. Carhart v. Aub. Gas Co., 22 Barb. 297; Ottawa Gas Co. v. Thompson, 39 Ill. 598; Howard v. Lee, 3 Sandf. 256. And it is sufficient to show that the property has been rendered less valuable for the purposes to which the owner has seen fit to devote it. First Bapt. Church v. Schen. & T. R. R., 5 Barb. 79;

So the act of keeping a large quantity of gunpowder in a wooden building, insufficiently secured, and situated near other buildings, thereby endangering the lives of persons residing in the vicinity, amounts to a public nuisance.<sup>1</sup> And if an accident occurs therefrom, by which an individual is wounded, he may recover damages against the party guilty of the nuisance, although the fire may not have been occasioned by any negligence of his.<sup>2</sup> Even a private dwelling-house may be kept in so negligent and filthy a manner as to become liable to this charge,<sup>3</sup> or a tenement-house cut up into small apartments, inhabited by a crowd of poor people in a filthy condition calculated to breed disease.<sup>4</sup> In all such cases a householder may recover damages caused by the nuisance, though not himself driven from his dwelling. Thus the keeper of a boarding-house, whose boarders were driven away by the offensive smells proceeding from a livery stable set up in an adjacent house, was allowed to maintain an action against the keeper of the stable for damages sustained from the loss of his boarders.<sup>5</sup>

*Trustees v. Utica & S. R. R.*, 6 *id.* 313. Stationing before the door of a mock-auction room a man with a placard inscribed "Beware of mock-auctions," was held to be a private nuisance, in *Gilbert v. Mickle*, 4 *Sandf. Ch.* 357.

<sup>1</sup> *People v. Sands*, 1 *Johns.* 78.

<sup>2</sup> *Myers v. Malcomb*, 6 *Hill*, 292; *Rex v. Taylor*, 2 *Stra.* 1167; *Duncan v. Thwaites*, 3 *B. & C.* 556; *Pierce v. Dart*, 7 *Cow.* 609; 4 *Wend.* 25; *Mayor v. Furze*, 3 *Hill*, 612.

<sup>3</sup> *State v. Purser*, *supra*. The tenant of premises is alone liable for a nuisance resulting from his own act or negligence in the use of the premises; but for a nuisance resulting from the structure of the building, the owner is liable. But as to an open area in front of the building, both owner and occupant are bound to render it safe to the public. *Durant v. Palmer*, 5 *Dutch.* 544. A person having an artificial drain under his house is bound so to keep it as not to do injury to his neighbor, although he has been guilty of no negligence, and the existence of this drain was in no way known to him. *Humphries v. Cousins*, 2 *C. P. D.* 239; and see *Jackman v. Arlington Mills*, 137 *Mass.* 277.

<sup>4</sup> *Meeker v. Van Rensselaer*, 15 *Wend.* 397.

<sup>5</sup> *Aldrich v. Howard*, *supra*; *Fish v. Dodge*, 4 *Den.* 311. The landlord may be joined in such an action if he leased the house to be converted into a stable under such circumstances as would have led to a reasonable belief that it would become a nuisance. *Id.*



§ 201 *a*. **Obstruction of Ways.**—It is a nuisance also to obstruct a highway, or render its use hazardous, by an excavation or the like ; or to place upon the foot-path of a public street a stall or stand for the sale of fruit, although rent is paid to the adjoining proprietor for the privilege.<sup>1</sup> The law will only tolerate such a partial and temporary obstruction in the street as may be necessary for purposes of business, as in receiving and delivering goods from a warehouse, or the like, provided the public convenience does not suffer. In a case where the defendant was indicted for a nuisance in placing goods on the foot-way and carriage-way in a public street, and suffering them to remain for the purpose of being sold at auction, thereby rendering the passage less convenient, but not entirely obstructing it, Chief Justice Tilghman, delivering the opinion of the court, said : “ The necessity which justifies such a nuisance must be a reasonable one. No one has a right to throw wood or stones into the street at his pleasure. But, inasmuch as fuel is necessary, he may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand, and other materials, may be placed in the street, provided it can be done in the most convenient manner. On the same principle, a merchant may have his goods placed in the street, for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it.” <sup>2</sup>

<sup>1</sup> *Morton v. Moore*, 15 Gray, 573; *Gerrish v. Brown*, 51 Me. 256; *Irvine v. Wood*, 51 N. Y. 224; *Dimmett v. Eskridge*, 36 Munf. 308.

<sup>2</sup> *Commonwealth v. Passmore*, 1 S. & R. 217. Any unauthorized continuous obstruction to the free passage of the public along a street amounts to a nuisance. *Davis v. Mayor*, 14 N. Y. 506. As for a wagoner to keep one or more wagons constantly before his store-house, in the street, although there was sufficient room for two carriages to pass abreast on the opposite side of the street: *King v. Russell*, 6 East, 427. Or for a coachman to stand with his coach in any particular part of the street for an unreasonable length of time waiting for passengers: *Rex v. Cross*, 3 Camp. 224. Or for a man to erect a wharf on a river, although its erection might be beneficial, and sufficient room be left for a free passage in the river: *Resp. v. Caldwell*, 1 Dall. 150; *Hart v. Mayor*, 9 Wend. 571.



§ 201 *b*. **Business carried on in Street.** — Nor can a man habitually carry on any part of his business in the street, to the annoyance of the public. If the nature of his business is such as to require more room than is contained upon his own premises, he must either enlarge them, or remove his business to some more convenient spot. Private interests must be made subservient to the general interests of the community, who are not to be prevented from passing freely along the highway. And where the defendant, being a lumber merchant, occupied a small yard close to the street, and, from the smallness of his premises was obliged to deposit pieces of lumber in the street, and to have them sawed up there, before they could be carried into his yard; and it was suggested to be necessary for his trade, and that it occasioned no more inconvenience than draymen letting down hogsheads of beer into the cellar of a publican; Lord Ellenborough said, “If an unreasonable time is occupied in delivering beer from a brewer’s dray into the cellar of a publican, it becomes a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The defendant in this case is not to eke out the inconvenience of his own premises by taking in the public highway into his lumber-yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business.”<sup>1</sup>

<sup>1</sup> *King v. Russell*, *supra*; *Rex v. Carlile*, 6 C. & P. 636; *Rex v. Jones*, 3 Camp. 230. In repairing a house, care must be taken that the encroachment on the highway be not unreasonable; for if the owner employs his own servants, and they erect a shed so far out into the street as to encroach unreasonably on the highway, the owner will be liable for the nuisance. Though if done by the servants of a contractor the owner is not liable. *Hilliard v. Richardson*, 3 Gray, 853. But building a house higher than it was before, whereby the street becomes darker, is not a public nuisance on account of the darkening only. *Rex v. Webb*, 1 Ld. Ray. 737. As to what encroachments upon a highway amount to a nuisance, see *Peckham v. Henderson*, 27 Barb. 207.

§ 202. **Causing Assembly in Street.** — A tenant will also be responsible for an obstruction, if he furnishes occasion, or does an act, which is likely to cause others to assemble around his premises, and produce such an obstruction in the street. The defendants were accordingly held guilty of a nuisance, in a case which arose in the city of Brooklyn, for causing the street in front of their distillery, in that city, to be obstructed by carts and teams, remaining therein an unreasonable time, waiting for an opportunity of loading with swill and slops from the distillery; although the defendants themselves used all reasonable diligence and despatch in the delivery, and were in the pursuit of a lawful business. The fact that the teams and carriages were not owned by the defendants, nor under their control, does not excuse them, if they, in effect, by the manner of conducting their business, invite such assemblages at the place where the article is delivered. And forasmuch as no length of time will enable a party to prescribe for a public nuisance, it was quite immaterial how long the practice had prevailed, or when the distillery was built.<sup>1</sup>

§ 203. **May arise from Act in itself Lawful.** — It is well settled that every individual is entitled to the undisturbed possession and enjoyment of his own property; but this right is subject to the qualification of an equal right in others to enjoy the possession of their property also. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. A man may therefore prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of his neighbors, even for a lawful purpose. He may make an excavation on his own land, but not so near that of another as to cause the land to slide into his canal: nor may he cast dirt or stones upon his neighbor's land, either by human agency or the force of gunpowder. If he cannot construct his work without adopting means that will injure his neighbor, he must abandon that mode of using his property, or will be held responsible for all

<sup>1</sup> *People v. Cunningham*, 1 Den. 524.

damages resulting therefrom,<sup>1</sup> although the work may be done in the most careful and skilful manner, or if a man negligently leaves noxious substances on his land which are washed by the rain along the surface of the ground into his neighbor's well, corrupting the water, he is liable for the injury, and it makes no difference whether such substances are carried upon the surface of the ground, or have soaked into the soil, and are carried along under the surface, by means of water diffusing itself according to natural laws.<sup>2</sup>

§ 204. **Injury must be Actual and Substantial.** — It must not, however, be inferred that an action can be maintained for a thing which merely puts another to inconvenience. Some actual damage must be sustained by the party complaining, to give him a standing in court; thus the mere act of diverting a watercourse, erecting a privy, or the like, is not sufficient to sustain an action, if it does no real injury to the plaintiff's inheritance or possession.<sup>3</sup> And the damage must be of such a character as is apparent to any ordinary person, and not merely such as can only be perceived by means of scientific or microscopic investigation.<sup>4</sup> So the building of a wall which intercepts a prospect, without obstructing the light, or the opening of a window whereby the privacy of a neighbor is disturbed, are not *per se* actionable; the only remedy in this latter case is to build on the adjoining land, opposite the offensive window.<sup>5</sup> And where a building having

<sup>1</sup> *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Same*, *id.* 163; *Aldred's Case*, 9 Co. 58; Roll. Abr. 565.

<sup>2</sup> *Brown v. Illius*, 27 Conn. 84.

<sup>3</sup> *Lansing v. Smith*, 8 Cow. 146; *Myers v. Malcomb*, *supra*; *Duncan v. Thwaites*, *supra*; *Mayor v. Henley*, 3 B. & Ad. 77; *Mills v. Hall*, 9 Wend. 315. Where the nuisance consisted in maintaining piles of wood on the street, constituting the bulkhead in front of the plaintiff's store-house, injury to the rental of the store-house is an injury which it suffers in common with all other property in the neighborhood, and will not sustain an action. *Dougherty v. Bunting*, 1 Sandf. 1.

<sup>4</sup> *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. 705.

<sup>5</sup> Per Eyre, J., *Chandler v. Thompson*, 3 Camp. 82; *Cross v. Lewis*, 4 D. & R. 234; *Knowles v. Richardson*, 1 Mod. 55; *Aldred's Case*, *supra*. That a man has a right to build a fence on his ground for the purpose of

windows overlooking vacant premises owned by the lessor was demised with the appurtenances by a lease which contained only a covenant for quiet enjoyment, the lessee was held to have acquired no right against the lessor, or those claiming under him, to have the windows remain unobstructed for the passage of light and air, or for any other purpose.<sup>1</sup> The injury must not only be of a substantial nature, but must arise from some other cause than the mere caprice or peculiar physical constitution of the party aggrieved. And to render a business liable to be abated as a nuisance, it must be offensive and unhealthful to persons of an ordinary nature and condition, and not merely to those of a delicate and sensitive organization. Thus the use of a warehouse for storing guano, in the ordinary manner, cannot be abated by showing that individual members of a family were nauseated by odors from it.<sup>2</sup> If the boughs of my tree grow over your land, you may cut them off; but you would not be justified in cutting them before they grow over your land, for fear they should grow over.<sup>3</sup> And as was said by the old jurists, when a Chandler erects a melting-house, it is a common nuisance; but if a man is so tender-nosed that he cannot endure sea-coal, he ought to leave his house.<sup>4</sup> Or if a man sets up a school so near my study, who am of the legal profession, that the noise interrupts my studies, no action lies.<sup>5</sup>

shutting up the window of a neighbor, see *Pickard v. Collins*, 23 Barb. 444; *Mahan v. Brown*, 13 Wend. 261; *Parker v. Foote*, 19 *id.* 309.

<sup>1</sup> *Doyle v. Lord*, 4 Jones & S. 421.

<sup>2</sup> *Robinson v. Baugh*, 31 Mich. 290.

<sup>3</sup> Per Coke, J., in *Norris v. Baker*, 1 Rolle, 394.

<sup>4</sup> Per Doddridge, J., in *Jones v. Powell*, Palm. 536; *Hall v. Swift*, 6 Scott, 167; *Bower v. Hill*, 1 Bing. (N. C.) 549.

<sup>5</sup> Com. Dig. Action on Case for a Nuisance. Noise caused by machinery having been acquiesced in for more than five years, the court refused to interfere on the ground of increased noise, it being proved that no new machinery, or change in the manner of working, had been introduced. *Gaunt v. Fynney*, L. R. 8 Ch. 8. A person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding-house, is not a nuisance. *Boom v. Utica*, 2 Barb. 104. Neither is a billiard-table. *People v. Sergeant*, 8 Cow. 139.

§ 205. **Reasonable exercise of Lawful Right, though Harmful, does not Constitute.** — Nor will an action lie for the reasonable use of a person's undoubted right, although it may be to the annoyance of another; as, if a butcher or brewer exercises his trade in a convenient place.<sup>1</sup> Nor was it considered actionable for a defendant, who was a sportsman, to keep six or seven pointers so near the plaintiff's dwelling-house that his family were prevented by their noise from sleeping during the night, and were very much disturbed in the day.<sup>2</sup> So the erection of a mill above another mill, whereby the owner of the lower mill is obliged to extend his dam, and is subjected to inconvenience in floating timber to his mill, but which does not affect his supply of water, is not actionable.<sup>3</sup> And although if, in such a case, the injury being trivial, the law will not afford redress, equity will interpose to prevent the lower mills being rendered useless or unproductive in any considerable degree.<sup>4</sup>

§ 206. **Diminution of Enjoyment of Easement Constitutes.** — There must, as we have said, be some sensible abridgment of the enjoyment of the tenement to which an easement is attached, in order to amount to a disturbance, although it is not necessary there should be a total obstruction of the easement.<sup>5</sup> Thus, to maintain an action for obstructing light, it is sufficient to show that the easement cannot be enjoyed

<sup>1</sup> *Elliotson v. Feetham*, 2 Bing. (N. C.) 134; *Bliss v. Hall*, 4 *id.* 183; *Flight v. Thomas*, 10 Ad. & E. 590. A tannery is not, *per se*, a nuisance. *State v. St. Com'rs of Trenton*, 36 N. J. 283.

<sup>2</sup> *Street v. Tugwell*, B. R. M. T. 41 Geo. III. But a dog in the habit of coming on a man's premises, barking and howling to the annoyance of his family, is a nuisance, and may be killed after reasonable notice to the owner. *Brill v. Flagler*, 23 Wend. 354.

<sup>3</sup> *Palmer v. Mulligan*, 3 Caines, 307; *Sackrider v. Beers*, 10 Johns. 241. Though a person has a right to erect a mill on his own ground where he pleases, yet he must so exercise that right as not to interfere with the existing rights of others; and therefore if A. erects a new mill in such a place, or so near the mill of B., that an artificial dam, before erected by B., causes the water to flow back on A.'s mill and obstruct its movement, A. has no right to complain of B.'s dam as a nuisance. *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282.

<sup>4</sup> *Merritt v. Brinkerhoff*, 17 Johns. 306; *Stiles v. Hooker*, 7 Cow. 268.

<sup>5</sup> *Moore v. Brown*, Dyer, 319, b, pl. 17.

in so full and ample a manner as before, or that the premises are, to a sensible degree, less fit for the purposes of business or occupation.<sup>1</sup> In a case of this kind, the court said: "The question is whether the plaintiff has the same enjoyment now which he used to have before, of light and air in the occupation of his house; and whether the alteration, by carrying forward the wall to the height of ten feet, has or has not occasioned the injury which he complains of. It is not every possible, every speculative exclusion of light which is the ground of an action; but that which the law recognizes is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business. It appears the defendants' premises had been injured by fire, and they re-erected them in a different manner from what they were before. They have a right to re-erect in any way they please, with this single limitation, that the alteration which they shall make, must not diminish the enjoyment by the plaintiff of light and air."<sup>2</sup>

§ 207. **Prospective Injury, how Prevented.** — But although some injury must have been sustained before redress can be had by a suit at law, yet if the necessary consequence of what has already been done will be an injury, it is not essential for a party to wait until actual damage shall have accrued, before proceeding to the appropriate remedy. For, as was said by an ancient authority, if a person intending to build a house, which will obstruct my ancient lights, erects fences of timber for the purpose of building, I have no right to pull them down; but if the eaves of the house, when built, will evidently project over my land, I need not wait till water actually falls from them, but may pull them down at once, or may apply to a court of equity to prohibit the impending injury. But mere threats, unaccompanied by an act, do not amount to a disturbance.<sup>3</sup> Who are liable, and to whom, for a nuisance, we have already noticed in another connection.<sup>4</sup> It does not

<sup>1</sup> *Cotterell v. Griffiths*, 4 Esp. 69.

<sup>2</sup> *Parker v. Smith*, 5 C. & P. 488; *Back v. Stacy*, 2 *id.* 465.

<sup>3</sup> *Baten's Case*, 9 Co. 54; 2 Roll. Abr. 145, Nuisance, V.

<sup>4</sup> *Ante*, § 175, and note.

moreover appear to be necessary, in order to maintain an action for the continuance of a nuisance, that the defendant should have been requested to remove it.<sup>1</sup> The damage occasioned by a nuisance need not be direct, in order to sustain an action; for the erection of a dam in a navigable stream, which obstructed the plaintiff's raft from passing, has been held sufficient for this purpose.<sup>2</sup>

§ 208. **Prescriptive Right to do Injurious Acts.** — Does not apply to Public Nuisance. — Many acts done upon a man's own property, which are in their nature injurious to the adjoining land, and consequently actionable as private nuisances, may, however, be legalized by prescription. Thus, the right not to receive impure air is an incident of property, and for any interference with this right an action may be maintained; but under an easement acquired by his neighbor, with twenty years' possession, a man may be compelled to receive the air from him in a corrupted state, as by the admixture of smoke or noisome smells, or to submit to noises caused by the carrying on of certain trades. So, with regard to flowing water, though the right to receive the stream in its accustomed course is an easement, yet the right not to have impure water discharged upon a man's land is one of the ordinary rights of property, the infringement of which can only be justified by an easement previously acquired by the party so discharging it. And an ancient user is held as between individuals to be a justification for the exercise of a noisy<sup>3</sup> or offensive trade,<sup>4</sup>

<sup>1</sup> *Wigford v. Gill*, Cro. El. 269; per Denio, J., in *Brown v. Cayuga R. R.*, 12 N. Y. 492. But see *McDonough v. Gilman*, 8 Allen, 264.

<sup>2</sup> *Hughes v. Heiser*, 1 Binn. 463. Where a man purchased a lot fronting on a river, for a dwelling-house lot, and covenanted not to use it for any offensive business, nor for a stone quarry, nor to permit any nuisance to be erected thereon, it was held that leasing the land with the privilege of building a wharf and a railway across the land, for the purpose of drawing stone from a neighboring quarry to the wharf for transportation thence, which wharf also, from its propinquity to a large city, would invite nuisances, was a breach of the covenant, and should be restrained by injunction. *Seymour v. McDonald*, 4 Sandf. Ch. 502.

<sup>3</sup> *Elliotson v. Feetham*, 2 Bing. (N. C.) 134.

<sup>4</sup> *Bliss v. Hall*, 5 Scott, 500. "The plaintiff came to his house with all the rights appurtenant to it, one of which at the common law is a right



as well as for discharging water in an impure state upon the adjoining land.<sup>1</sup> But no length of time will legalize a public nuisance;<sup>2</sup> nor will it affect the question in any way, that the premises injured by a private nuisance were erected after the nuisance was created, for every continuance of it is a fresh nuisance.<sup>3</sup> Even public authorities cannot legalize a nuisance by which a citizen is damaged; and therefore the erection of a permanent awning upon a sidewalk was held to be a nuisance which the court would enjoin at suit of an individual who sustains special injury therefrom, notwithstanding it had been licensed by the commissioner of public works.<sup>4</sup>

§ 209. **Equitable Power to Restrain, when Exercised.** — A court of equity will ordinarily interpose by injunction to restrain an existing or threatened nuisance to property, if the injury be shown to be of such a character as will materially diminish its value or seriously interfere with its comfortable enjoyment; especially if it appears to be a case where substantial damages could not be recovered in a suit at law.<sup>5</sup> In the

to wholesome, untainted air; unless the business which creates the nuisance has been carried on there for so great a length of time that the law will presume a grant from his neighbors in favor of the party who uses it, and twenty years' user would alone legalize the nuisance." Per Tindal, C. J. In this case, the defendant carried on the business of a tallow-chandler on the adjoining premises three years before the plaintiff entered upon his premises, but it was held insufficient to legalize the nuisance.

<sup>1</sup> Wright v. Williams, 1 M. & W. 77.

<sup>2</sup> Stammers v. Dixon, 7 East, 200. See the application of the common-law principle, *nullum tempus occurrit regi*, to the case of a public nuisance. Dygert v. Schenck, 23 Wend. 446. It is said, however, in Peckham v. Henderson, 27 Barb. 207, that this rule does not apply to the case of a simple encroachment upon a highway, which does not amount to an obstruction, or substantial annoyance to the public. But Turner v. Ringw. H. Bd. L. R. 9 Eq. 418, V. C. James, is *contra*.

<sup>3</sup> Brady v. Weeks, 8 Barb. 157. All trades which render the enjoyment of life and property uncomfortable, must recede before the advance of population. Howard v. Lee, 3 Sandf. 281; per Oakley, C. J.

<sup>4</sup> Trenor v. Jackson, 46 How. Pr. R. 389. A work specially authorized by law cannot be a nuisance. Hinchman v. Patterson R. R., 17 N. J. Eq. 78.

<sup>5</sup> Catlin v. Valentine, 9 Paige, 575; Stetson v. Faxon, 19 Pick. 147; Penniman v. N. Y. Balance Co., 13 How. Pr. R. 40; Mayor v. Curtis,



case of a private nuisance, however, the fact that the complainant had slept on his rights (in the case referred to for seven years) raised a strong, if not conclusive, presumption that the injury complained of was not of so pressing and urgent a nature as to entitle him to come into a court of equity and obtain the aid of an injunction to restrain such nuisance.<sup>1</sup> But a tenant who is aggrieved by a private nuisance, besides resorting to an action at law for damages, or applying to a court of equity for an injunction to prevent its erection,<sup>2</sup> *may also enter and abate the nuisance*, without the

Clarke, Ch. 336; *Barrow v. Richards*, 8 Paige, 351; *Hamilton v. Whitridge*, 15 Md. 128; *Adams v. Michael*, 38 *id.* 123; *Curtis v. Winslow*, 38 Vt. 690. In *Crump v. Lambert*, 15 W. R. 417, Ld. Romilly, M. R., says, "The law on this subject is the same, whether it be enforced by an action at law, or by a bill in equity. There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapors, or water, or any gas, or fluid. The owner of one tenement cannot cause or permit to pass over or flow into his neighbor's tenement, any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupant of the neighboring tenement, or so as to injure his property. The real question in all the cases is one of fact, whether the annoyance is such as materially to interfere with the ordinary comfort of human existence."

<sup>1</sup> *Heiskell v. Gross*, 3 Brewst. 430.

<sup>2</sup> *Lansing v. Smith*, 4 Wend. 9. Common-law remedies for nuisance have become obsolete, and were never encouraged by our courts. *Kentz v. McNeal*, 1 Den. 436. And see *Brown v. Woodworth*, 5 Barb. 550; *Wagoner v. Jermaine*, 3 Den. 306. The court will not interfere by injunction to prevent or remove a nuisance, unless it has been erected in violation of a right which a man has long previously enjoyed: *Robeson v. Pittinger*, 2 N. J. Eq. 57, *Rhee v. Forsyth*, 37 Pa. St. 503; *Crenshaw v. State River Co.*, 6 Rand. 245; *Webb v. Portland Manuf. Co.*, 3 Sumn. 189; and there must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law: *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; *Gardner v. Newburgh*, 2 *id.* 164; *Att'y-Gen. v. Utica Ins. Co.*, *id.* 379. But if the thing is in itself a nuisance, and the plaintiff's right is not doubtful, the court will interfere to stay irreparable mischief, without waiting for the result of a trial. *Mohawk Br. Co. v. U. & S. R. R.*, 6 Paige, 554; *Huds. & D. Canal Co. v. N. Y. & E. R. R.*, 9 *id.* 323. It will not interpose if the nuisance has been acquiesced in, or encouraged by the party seeking relief: *Lenhardt v. Morris Canal Co.*, 1 N. J. Eq. 518; *Harrison v. Newton*, 9 N. Y. Leg. Obs. 347; *Saunders v. Smyth*, 3 Myl. & C. 711; *Lewis v. Chap-*

formality of legal process;<sup>1</sup> and trespass will not lie against him, either for the entry or the abatement, provided he has sustained special injury by it, and provided further that he commits no riot in doing it.<sup>2</sup>

§ 209 *a.* **Abatement of.** — A public nuisance may be abated by any one, a private nuisance by any one whose property is injured.<sup>3</sup> For its removal a party is only liable to the owner for any wanton or unnecessary injury he may cause; and the kind of property suffering detriment as well as other circumstances attending the occurrence are always to be taken into consideration when determining the question of damage. At the same time the authorities agree he has no right to abate a writ if it involves a breach of the peace or gives occasion to a riot.<sup>4</sup> Thus where the nuisance complained of was the obstruction of a rivulet by a dam, by means whereof the defendant's cattle could not obtain water so plentifully as before, the defendant was justified in entering upon the plaintiff's soil and removing the dam.<sup>5</sup> Lord Ellenborough, delivering

man, 3 Beav. 138; or if he consents to their erection, unless some injurious change is afterwards made in them: *Hulme v. Shreve*, 4 N. J. Eq. 116; or, if it merely contravenes the general or public policy: *Smith v. Lockwood*, 13 Barb. 209.

<sup>1</sup> *Gleason v. Gary*, 4 Conn. 418; *Kendrick v. Bartland*, 2 Mod. 253; *Raikes v. Townsend*, 2 Smith, 9; *Meeker v. Van Rensselaer*, 15 Wend. 397. The act of a plaintiff in abating a private nuisance does not bar him of an action of damages; for the abatement of a nuisance is merely preventive. *Pierce v. Dart*, 7 Cow. 609. Nor does his assent to it take away his right afterwards to abate it if he thinks proper. *Pilchar v. Hart*, 1 Humph. 524.

<sup>2</sup> *Wetmore v. Tracy*, 14 Wend. 250; *Baten's Case*, 9 Co. 54, b; *Colburn v. Richards*, 13 Mass. 420; *Fort Pl. Bridge Co. v. Smith*, 30 N. Y. 44; *Dougherty v. Bunting*, 1 Sandf. 1; *Harrower v. Ritson*, 37 Barb. 301.

<sup>3</sup> *Arundell v. McCulloch*, 10 Mass. 70; *Wetmore v. Tracy*, 14 Wend. 250; *Lancaster T. Co. v. Rogers*, 2 Pa. St. 114.

<sup>4</sup> *Day v. Day*, 4 Md. 262; *Ely v. Niagara Co.*, 36 N. Y. 297.

<sup>5</sup> *Raikes v. Townsend*, 2 Smith, 9. "If a man builds a house so near to mine that it stops my lights or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil, and pull it down, and for this reason only a small fine was set upon the defendant in an indictment for a riot, in pulling down some part of a house, it being a nuisance to his lights, and the right found for him in

the opinion of the court in this case, illustrates the principle by the following cases: "If a man make a ditch in his own land, by means of which the water which runs to my mill is diminished, I may myself fill up the ditch. If he erects upon his own soil anything which is a nuisance to my house, mill, or land, I may remain on my own soil, or enter upon his, and throw it down, and justify this in an action of trespass. If he stops my way to my common, and encloses the common, I may justify the dejection of the enclosure of the common or way. And this I may still do if I have only an estate for years." But a man may not turn the water back on the land of the party who increases the natural flow of the stream by means of ditches.<sup>1</sup>

§ 210. **Reasonable Care to be used in Abatement of.** — In abating a private nuisance, a party is bound to use reasonable care that no more damage is done than is necessary to effect the purpose; and, so long as he complies with this rule, he will not be answerable for any damage resulting from his acts in relation thereto.<sup>2</sup> As where a man erected a mill-dam partly upon his own land and partly upon the land adjoining, and the owner of the adjoining land pulled down the portion of the dam standing upon his land, by which all the dam fell down, and the water ran out, the court held the action of the latter justifiable.<sup>3</sup> So if one erects a wall, partly upon his own land and partly upon the land of his neighbor, and the neighbor pulls down that part of the wall which projects over on his land, and thereupon all the wall falls down, this is lawful.<sup>4</sup> But he may not abate more than is absolutely necessary, and therefore, where a plaintiff had a right to irrigate his meadow by placing a dam of loose stones across a stream, and *occasionally* a board and fender, and he fastened the

an action for stopping his lights." *Rex v. Rosewell*, 2 Salk. 459; and see *Bellows v. Sackett*, 15 Barb. 96.

<sup>1</sup> *Williams v. Gale*, 3 Har. & J. 231.

<sup>2</sup> *Hicks v. Dorn*, 42 N. Y. 47; *Dyer v. Depui*, 5 Whart. 584; *Gates v. Blincoe*, 2 Dana, 158; *James v. Hayward*, W. Jones, 222.

<sup>3</sup> 2 Rolle, Abr. Nusans (S).

<sup>4</sup> *Wigford v. Gill*, Cro. El. 269.

board with two stakes, which he had no right to do, the defendant was held justifiable in removing the stakes, but not in removing the board.<sup>1</sup>

§ 211. **Private Action for. — Damages. — Demand.** — The fact that a private nuisance is indictable as a public nuisance; or the continuance of a nuisance, as where it was created by the overflowing of lands by means of a mill-dam, for twenty years and upwards, — though it constitutes no defence to a proceeding on the part of the public to abate it, will in neither case prevent an individual from bringing an action against the party causing it, provided he can prove that he has himself sustained some special injury thereby, distinct from what he suffers in common with the public.<sup>2</sup> And the rule applies in favor of any person who suffers damage, whether direct or consequential, from a common nuisance.<sup>3</sup> Nor will the abatement of a nuisance by a plaintiff preclude him from recovering damages sustained by himself prior to the abatement.<sup>4</sup> *No previous demand* to remove the nuisance need be made before making such an abatement, except where the tenement on which the nuisance is erected has passed into other hands since its erection;<sup>5</sup> and a demand may then be made, either on the lessor or lessee; for the continuance of it is, as we have seen, a nuisance by the lessee, against whom an action would also lie.<sup>6</sup>

<sup>1</sup> *Greenslade v. Halliday*, 6 Bing. 379; *Williams v. Gale*, 3 Har. & J. 231.

<sup>2</sup> *Chichester v. Lethbridge*, Willes, 73; *Crowder v. Tinkler*, 19 Ves. 621; *Mills v. Hall*, 9 Wend. 315; and see *Penruddock's Case*, 5 Co. 101.

<sup>3</sup> *Lansing v. Smith*, 4 Wend. 9; *Cole v. Sproul*, 35 Me. 161; *Stetson v. Faxon*, 19 Pick. 147; *Harrison v. Sterett*, 4 Harr. & M. 540; *Gates v. Blincoe*, 2 Dana, 158.

<sup>4</sup> *Gleason v. Gary*, 4 Conn. 418; *Pierce v. Dart*, *supra*.

<sup>5</sup> *Wigford v. Gill*, *supra*; *Conhocton St. Rd. v. Buff. N. Y. & Erie R. Co.*, 51 N. Y. 578; when notice or knowledge of its existence must be shown.

<sup>6</sup> *Brent v. Haddon*, Cro. Jac. 555; *Gleason v. Gary*, *supra*.

## SECTION VI.

## OF EASEMENTS.

§ 212. **In General, what.** — We have seen that a tenant is entitled to the use of all those privileges, easements, and appurtenances in any way belonging to the premises under lease, as incident to his grant, unless they have been expressly reserved, and excepted out of the lease;<sup>1</sup> while he is, at the same time, bound to the performance of all such duties as have been lawfully imposed upon the land for the benefit of others, either by private agreement or by virtue of some regulation made by authority of the city or town within whose boundary he has located himself. As these duties and easements essentially affect the tenant's enjoyment of the premises, we propose to notice the most important of them, with some of their modifications. Under the head of easements may be included all those privileges, which the public, or the occupants of neighboring lands, or tenements, have in the lands of another, and by which the servient owner, upon whom the burden of the privilege is imposed, is obliged to suffer, or not to do something on his own land, for the advantage of the public or of the person to whom the privilege belongs.<sup>2</sup> Of these we may

<sup>1</sup> Thus the lease of a mill "just as it is," and with no conditions attached to the tenancy, carries with it the exclusive right to the use of the water which furnishes the motive power to the mill. *Moody v. King*, 75 Me. 497.

<sup>2</sup> An easement is a privilege without profit, which one neighboring tenement hath of another, existing in respect of their several tenements; by which the servient owner is obliged to suffer, or not to do something on his land, for the advantage of the dominant owner. As to its essential qualities, it is incorporeal, although imposed upon corporeal property; confers no right to a participation in the profits arising from such property; is imposed for the benefit of corporeal property, and must exist between two distinct tenements, — the dominant, to which the right belongs, and the servient, upon which the obligation rests. *Termes de la Ley*; *Gale & Whatley's Law of Easements*. As an incorporeal hereditament, it passes with the dominant tenement by grant or succession; and the servient tenement is transmitted subject to the easement, in like manner. *Wolfe v. Frost*, 4 Sandf. Ch. 72. No one can be said to have an easement in his own land. *Huttemeier v. Albro*, 2 Bosw. 546.

specify ways, commons, fisheries, watercourses, removal of buildings, and the right of support from neighboring soil. There are, besides, a great variety of other servitudes enumerated by Chancellor Kent, in his Commentaries, which grow up in cities, where the population is dense and the buildings are compact, — as the right of support, which arises from contract or prescription, where the owner of a house stipulates to allow his neighbor to rest his timbers on the walls of his house, or the servitude of drip, by which one man engages to permit the waters flowing from the roof of his neighbor's house to fall on his estate. Of the same description is the right of drain, or leave to convey water in pipes through or over the estate of another. These servitudes or easements can only be created by the owner of the servient tenement; and one tenant in common cannot establish them upon the common property without the consent of his co-tenant. Their extent must be determined by the terms of the grant, or the nature of the enjoyment by which they were acquired; and if established by prescription, or to be inferred from user, they are limited to the actual user.<sup>1</sup> They may be limited to certain times; as the drawing of water from a neighbor's well at certain hours; or a right of passage to a portion of the day, or to a certain place. And are always to be distinguished from a mere license, or personal privilege of doing particular acts upon the land of another, and which may or may not be conferred upon a tenant, or may be allowed to one tenant and withheld from another. Any attempt to exercise such privileges without the owner's consent will subject the party to an action; and a court of equity has jurisdiction in a proper case to regulate, or restrain by injunction, any violation of rights established by grant or otherwise.<sup>2</sup>

<sup>1</sup> *Dixon v. Clow*, 24 Wend. 188; *Corning v. Gould*, 16 Wend. 531. A right claimed by user, is only co-extensive with the user. *Brooks v. Curtis*, 4 Lans. 283.

<sup>2</sup> 3 Kent, Com. 436; *Seymour v. McDonald*, *supra*; *Brouwer v. Jones*, 23 Barb. 153. See the distinction between an easement and a license, *post*, § 237 a.

(a.) *Of a Right of Way.*

§ 213. **Defined.** — **Arises from Grant, express or implied, or from Necessity.** — A right of way is the right to use the surface of another person's land for the purpose of passing and repassing; and it includes the incidental right of properly adapting the surface to that use, by levelling, gravelling, ploughing, or paving, while the owner of the soil retains all the rights and benefits of ownership consistent with such an easement.<sup>1</sup> It may arise by a grant of the owner of the soil; by prescription, which supposes a grant; or from necessity. When claimed by grant, it can only be created by deed, although it may be but an easement upon the land of another, and not an interest in the land itself. It concedes only a right of passing in a particular line, and not to vary it at pleasure, or to go in different directions;<sup>2</sup> and, if granted for a particular purpose, it does not include a right of way for another purpose.<sup>3</sup> If it be a right of way, in gross, or a personal right, it is not assignable; and is in that case so exclusive that the owner of the right cannot take another person with him. But when the right is appendant, or annexed to the estate, it passes with the land to an occupant or assignee.<sup>4</sup>

<sup>1</sup> *Perley v. Chandler*, 6 Mass. 454; *Atkins v. Boardman*, 2 Met. 457. The owner of a right of way has a right to remove all obstructions placed in it. *Williams v. Safford*, 7 Barb. 309. The grantee of a private right of way, for his own accommodation, must keep it in repair. *Wynkoop v. Burger*, 12 Johns. 222.

<sup>2</sup> *Hewlins v. Shippam*, 5 B. & C. 221; *Jones v. Percival*, 5 Pick. 485.

<sup>3</sup> *Cowling v. Higginson*, 4 M. & W. 245.

<sup>4</sup> *Staple v. Heydon*, 2 Ld. Ray. 922; *Ackroyd v. Smith*, 10 C. B. 164. Under a lease of an alley, describing it as a lot of land, reserving a right of way to the grantor through the granted lot, it was held that the grantor was not bound to leave the whole alley open, but only enough to give unobstructed the right of way for the purposes reserved. *Jackson v. Allen*, 3 Cow. 220. It is no defence to an action for use and occupation, under a lease of a right of way, that other persons than the lessee have the same right, if such right is in neither case exclusive. *Ledyard v. Morey*, 54 Mich. 77.



§ 214. **From necessity.**— **When incident to a grant.** — **Rights of parties.** — *A right of way from necessity arises* when a man leases or sells land to another, which is wholly surrounded by his own land; and the lessee or purchaser in such case is entitled to a reasonable passage over the lessor's ground to arrive at his land; for this is a necessary incident to the grant, without which the grant would be useless.<sup>1</sup> It cannot be claimed by one who already has a way over his own ground, however inconvenient that may be;<sup>2</sup> nor if there is a nearer and a better way than that which is claimed.<sup>3</sup> The right of locating it belongs to the owner of the outer land; but it must be a convenient way.<sup>4</sup> And after it has been once marked out, the grantee has no right to deviate from the course so designated; although the way may become impassable from being temporarily overflowed, or otherwise.<sup>5</sup> There is, however, a temporary right of way over adjoining lands if the highway be out of repair, or otherwise impassable; but this principle applies only to public and not to private ways, for a person having a private way over another's land has no right to go upon the adjoining land, even though the private way be impassable.<sup>6</sup>

§ 214 *a*. **Liability of Owner of servient Estate.**— As a general rule easements impose no personal obligation upon the owner of the servient tenement to do anything; and it is an inference of law in the absence of a grant or contract that the

<sup>1</sup> Doty *v.* Gorham, 5 Pick. 487; Holmes *v.* Seely, 19 Wend. 507. Alexander *v.* Tolleston Club, 110 Ill. 65; Powers *v.* Harlow, 53 Mich. 507. Where a tenant acts at his own peril in accepting a lease of land to which there is no road, although some marks indicating such a road appear, no fraud as against the tenant is to be imputed to the landlord, in the absence of positive misrepresentation on his part. Handrahan *v.* O'Regan, 45 Iowa, 298.

<sup>2</sup> McDonald *v.* Lindall, 3 Rawle, 492.

<sup>3</sup> Jeter *v.* Mann, 2 Hill, (S. C.) 641.

<sup>4</sup> Russell *v.* Jackson, 2 Pick. 574; Capers *v.* Wilson, 3 McCord, 170.

<sup>5</sup> Miller *v.* Bristol, 12 Pick. 550; Wynkoop *v.* Burger, *supra*.

<sup>6</sup> Miller *v.* Bristol, 12 Pick. 552; Taylor *v.* Whitehead, Doug. 745. If a man gives another a license to lay pipes of lead in his land, to convey water to a cistern, he may enter on the land, and dig therein, to mend the pipes. Per Twisden, J., in Pomfret *v.* Ricroft, 1 Saund. 321.



party who enjoys the benefit of an easement must keep it in repair. And therefore a person over whose land another has a right of way may be liable to an action for obstructing the way, but not for suffering it to be out of repair, unless he is expressly bound by contract or by prescription to keep it in repair.<sup>1</sup> If he obstructs a way which he has once granted, the grantee may go *extra viam* over other of his land, and neither he nor a purchaser with notice from him will be allowed to obstruct the substituted mode of access, so long as the original obstruction exists.<sup>2</sup> The extent to which the owner of agricultural lands subject to a right of way by the owners of the same description of lands, may obstruct or interfere with the use of them by gates and bars, is to be determined by the necessity of the erection of such obstructions for the protection of his other property; and in every case the question is for the jury.<sup>3</sup>

§ 215. **Along Banks of navigable Streams.**—The question has been much discussed whether a right of way, or path for towing vessels, exists along the banks of navigable rivers. Mr. Chancellor Kent observes, that, in those countries where the liberal doctrines of the Roman law have been adopted, lands on each side of a navigable river, as well as on the seashore, have always been regarded as dependencies of the public domain, and subject to the servitude, or burden, of towing-paths, for the benefit of the public; but that no such right exists according to English law.<sup>4</sup> There has been no adjudication upon this point in New York although it has been held that the public have no right to use and occupy the land of an individual, adjoining navigable waters, as a public landing, or place of deposit of property in its transit, against the will of the owner; notwithstanding such user

<sup>1</sup> Prescott v. White, 21 Pick. 342; Prescott v. Williams, 5 Met. 435; Doane v. Badger, 12 Mass. 69. The owner of the servient estate is bound to do no act to render the way unnecessarily dangerous. Thus a railroad company is bound to use reasonable care in running its trains over a way appurtenant to houses which it leases to its employees. McDermott v. N. Y. C. & H. R. R. Co., 28 Hun, 325.

<sup>2</sup> Selby v. Nettlefold, L. R. 9 Ch. 111.

<sup>3</sup> Husen v. Young, 4 Lans. 63.

<sup>4</sup> Ball v. Herbert, 3 T. R. 253.

may have been continued upwards of twenty years, with the knowledge of the owner.<sup>1</sup> Nor is the lessee of a wharf entitled, by virtue of his lease, to place structures on the pier which would materially encumber it, or interfere with its free use for purposes connected with navigation, by the general public, however advantageous the erection might be to him, or to those interested with him. But it is held, in Missouri, that navigators and fishermen are entitled to the temporary use of the banks of navigable rivers in that State, though owned by private individuals, for the purpose of landing and repairing their vessels, and exposing their sails and merchandise; but that such use is only for transient purposes, and under restriction.<sup>2</sup>

§ 216. *For special Uses, limited to such Uses.*—A right of way by prescription, for agricultural purposes, is a limited and qualified right, and does not necessarily confer a right to use such way for general or commercial purposes; nor does a right of way for carriages necessarily include a way for cattle.<sup>3</sup> A reservation, in a lease, of a right of way on foot for horses and cattle, does not give a right to carry manure;<sup>4</sup> for a right of way to a close for some purposes cannot

<sup>1</sup> *Pearsall v. Post*, 20 Wend. 111; s. c. 22 *id.* 425; *Comm'rs v. Clark*, 33 N. Y. 251. This case also holds that the lease of a wharf from the public authorities of a city does not confer on the lessee an exclusive right to the possession, use, or control of the wharf. So far as it is used by his own vessels, he pays no wharfage; and so far as it is made use of by other persons, he, as the grantee of the city, succeeds to the rights of that corporation in respect to wharfage. It is, notwithstanding, a public wharf, and vessels resorting to it, whether they are those of the lessee or of other persons, are subject to the general rules of law regulating the use of wharves, piers, and slips, and the mooring and stationing of vessels.

<sup>2</sup> *O'Fallon v. Daggett*, 4 Mo. 343. There is nothing inconsistent with the purposes of a sea or river wall, or embankment erected to protect neighboring lands, in a right of way along the surface thereof; and the same evidence of user will raise a presumption of a dedication of a right of way by the owner of the soil, in the case of such an embankment, as in any other case of uninterrupted and open user by the public. *Greenw. Bd. v. Maudsley*, L. R. 5 Q. B. 397.

<sup>3</sup> *Jackson v. Stacy*, Holt, N. P. C. 455; *Ballard v. Dyson*, 1 Taunt. 279; *Kirkham v. Sharp*, 1 Whart. 323.

<sup>4</sup> *Brunton v. Hall*, 1 Gale & D. 207.

be enlarged for other purposes.<sup>1</sup> But the extent of this right is a question for a jury under the circumstances of each particular case.<sup>2</sup> And as a general rule, where there is a license to use a certain way, there must be a reasonable use of it; as, if a man let a house, reserving a right of way to the rear, he cannot go through without request, nor at unseasonable hours.<sup>3</sup> Twenty years' uninterrupted user is sufficient to presume the grant of a right of way, provided it is held adversely, and not by permission.<sup>4</sup> But the erection of a gate at the time a way is opened, or the open declarations of the owner at such time, contradictory of the right, will rebut the presumption of the grant of a common way.<sup>5</sup> The extent of the right is limited by the ordinary mode of user, unless a grant be shown, in which case it will be confined to the terms of the instrument not having been adverse thereto.<sup>6</sup>

§ 217. **When defeated by Non-user or uniting Possession.** — From long forbearance to exercise a right of way, a release of it may be presumed; but when the right can only be acquired by twenty years' enjoyment, it cannot be lost by disuse for a shorter period.<sup>7</sup> Unity of possession, of the close where a private way exists, with the close to which such a way is appurtenant, or which gives the right of way, may cause an extinction of the same; as, if a man have a way over the close of another, and he purchases that close, the way is extinguished by unity of possession.<sup>8</sup> But this is to be understood of a mere way of easement; for if it be a way of necessity, it will not be extinguished by such a unity of pos-

<sup>1</sup> *Comstock v. Van Deusen*, 5 Pick. 163; *Webster v. Bach*, 1 Freem. 247.

<sup>2</sup> *Cowling v. Higginson*, 4 M. & W. 245.

<sup>3</sup> *Tomlin v. Fuller*, 1 Vent. 48.

<sup>4</sup> *Maverick v. Austin*, 1 Bail. 59; *Gayetty v. Bethune*, 14 Mass. 53; *Turnbull v. Rivers*, 3 McCord, 131.

<sup>5</sup> *Commonwealth v. Newbury*, 2 Pick. 51; *Barker v. Clark*, 4 N. H. 384.

<sup>6</sup> *Hart v. Chalker*, 5 Conn. 316; *Atkins v. Boardman*, 20 Pick. 291.

<sup>7</sup> *Wright v. Freeman*, 5 Har. & J. 476; *Emerson v. Wiley*, 10 Pick. 316; *White v. Crawford*, 10 Mass. 189. See also *Miller v. Garlock*, 8 Barb. 153.

<sup>8</sup> *Dyer*, 295; *Sury v. Pigott*, Palm. 446; s. c. 3 Bulst. 340.

session ; nor unless the necessity has ceased.<sup>1</sup> And if it be a prescriptive easement, mere unity of possession but suspends the right ; it requires a unity of ownership to destroy it.<sup>2</sup> Therefore, where a party seised in fee of certain premises took a lease of the adjoining land, the owner of which had previously enjoyed an easement in the former, such unity of possession was held to suspend, but not to extinguish, the right of way over the former.<sup>3</sup>

(b.) *Of Commons.*

§ 218. **Defined.** — **Right of, exists in New York.** — The term commons is used to denote that right or privilege which one or more persons have to take or use some portion of that which another person's lands, woods, or waters produce, in order to provide pasture for his cattle, fuel for his family, or means of repairing his houses, fences, and implements of husbandry. It was originally designed to encourage agriculture, and generally commenced in some agreement between lords of manors and their tenants ; but, being continued by usage, it became valid without an instrument in writing to prove the original grant. The most general and valuable kind of common is that of pasture, or the right of feeding one's beasts on another's lands. The policy of the old law, however, in favor of common of pasture and of estovers, as being conducive to improvement in agriculture, has entirely changed or become obsolete, and the right itself is now scarcely recognized in this country. It probably does not exist in any of the Northern or Western States of the Union,<sup>4</sup> except in the State of New York, where it has been the subject of litigation ; resulting, substantially, in the adoption of the principle of English law, that where the right of common of pasture has once been established, the right of the owner of the soil to improve the residue of his waste lands must be

<sup>1</sup> *Grant v. Chase*, 17 Mass. 443 ; *McDonald v. Lindall*, 3 Rawle, 495.

<sup>2</sup> *Manning v. Smith*, 6 Conn. 289 ; *Canham v. Fisk*, 2 Tyrw. 155.

<sup>3</sup> *Thomas v. Thomas*, 2 Cr. M. & R. 34.

<sup>4</sup> *Trustees v. Robinson*, 12 S. & R. 33.

exercised consistently with the preservation of the right of common.<sup>1</sup>

§ 219. **Appendant or Appurtenant. — Of Pastures and Estovers.** — Common of pasture is either appendant or appurtenant. The first is founded on prescription, and is regularly annexed to arable land. It authorizes the tenant to put commonable beasts upon the waste grounds of the manor, but such beasts must be *levant* and *couchant* on the estate; that is, such cattle only as are necessary to plough and manure the land, and so many as the land will sustain during the winter. Common *appurtenant* may be annexed to any kind of land, and may be created by grant as well as by prescription. It allows the occupant to put in other beasts than such as plough or manure the land; and, not being founded on necessity, like the other right as to commonable beasts, was never favored in law.<sup>2</sup> Common of pasture, whether appendant or appurtenant, may be apportioned; for, as the land is entitled to common only for such cattle as are necessary to plough and manure it, the common cannot of course be surcharged by any number of divisions or subdivisions in consequence of alienation. Such common, therefore, being incident to the land, passes with it in such proportions as the land may be divided into.<sup>3</sup> But common of estovers is not apportionable: for if this were to be allowed, the land might be surcharged; as if, for instance, estovers are granted to a farm of two hundred acres, so long as this is one farm there is but one house to be supplied, and, perhaps, not more than two chimneys; but, if the farm is divided, and another house becomes necessary, double the

<sup>1</sup> *Watts v. Coffin*, 11 Johns. 495. A custom that all the inhabitants of a particular town, for the time being, have the right to depasture the unenclosed woodlands of individual proprietors within the town, is not a mere easement, like a right of way, or a right to flow water; it is a right to take a profit; and for such a right, the commoner must prescribe in respect to some estate, and not in respect to mere inhabitancy. The custom is therefore void. *Smith v. Floyd*, 18 Barb. 522; *Pearsall v. Post*, 20 Wend. 111; s. c. 22 *id.* 425; *Grimstead v. Marlowe*, 4 T. R. 717; *Gateward's Case*, 6 Co. 59, b.

<sup>2</sup> *Van Rensselaer v. Radcliff*, 10 Wend. 639.

<sup>3</sup> *Livingston v. Tenbroeck*, 16 Johns. 26; *Bennet v. Reeve*, Willes, 227.

number of chimneys must be supplied, which would be injurious to the inheritance if it were to be allowed.<sup>1</sup> So, also, with respect to fences and buildings; upon a division of the farm, more fences and buildings become necessary, and if both are to be supplied from the woods of the proprietor, an increased quantity would be taken, when by the grant itself only estovers for one farm were intended.

§ 220. **Estovers a Joint Right, and not Apportionable.** — Since estovers cannot be apportioned, neither of the tenants, in case of the division of a farm among themselves, can have them. They belong to the whole farm as an entirety, and not to parts of it; and as the owner of no one portion can enjoy the right, it is necessarily extinguished, and can only be revived by a new grant.<sup>2</sup> And if common of estovers devolves upon several by operation of law, as by descent, they cannot (at least under the operation of the statute of descents in New York) enjoy the right in severalty; although they may unite in a conveyance, and vest the right in one individual. It is a joint right, and is to be enjoyed by the heirs or their assigns jointly, — on the principle that the land charged with the right ought not to have an increase of burden by the multiplication of claimants.<sup>3</sup> If a stranger, who has no right to its enjoyment, puts his cattle upon the common, the landlord may distrain them damage-feasant, or may have his remedy by action of trespass; and the commoner may, in like manner, distrain, or sue for damages by an action on the case.<sup>4</sup> If a commoner surcharge the common, the landlord may distrain the extra beasts, or bring trespass, while the other commoners may have an action on the case.<sup>5</sup>

<sup>1</sup> *Livingston v. Ketcham*, 1 Barb. 592.

<sup>2</sup> *Van Rensselaer v. Radcliff*, 10 Wend. 649; *Corning v. Gould*, 16 Wend. 531.

<sup>3</sup> *Leyman v. Abeel*, 16 Johns. 30. A tenant entitled to estovers in the unappropriated lands of a manor, may, if the landlord seeks to deprive him of his right by leases of the adjoining common lands, resort to more distant parts, though they are more valuable. *Van Rensselaer v. Brice*, 4 Paige, 174. Firebote cannot be claimed for an under-tenant. *Sarles v. Sarles*, 3 Sandf. Ch. 601.

<sup>4</sup> *Cheesman v. Hardham*, 1 B. & A. 706; *Ricketts v. Salwey*, 2 *id.* 360.

<sup>5</sup> *Bowen v. Jenkins*, 6 Ad. & E. 911.

(c.) *Of Fisheries.*

§ 221. **General or Private, defined.** — A common of fishery, according to Mr. Chancellor Kent, is of two kinds: the one, a right of fishing common to all; and the other, a right vested exclusively in one or a few individuals. By the common law, owners of land on the banks of fresh-water rivers, above the ebbing and flowing of the tide, have the exclusive right of fishing, as well as the right of property opposite to their respective lands *ad filum medium aquæ*. And where the lands on each side of the river belong to the same person, he has the same exclusive right of fishery in the whole river, so far as his lands extend along the same. But such right is always subject to the public convenience; and all erections or impediments made by the owners, so as to obstruct the free use of a river, as a highway for boats or rafts, are deemed nuisances.<sup>1</sup> So far as regards rivers that are not navigable (and, in the common-law sense of the term, those only are deemed navigable in which the tide ebbs and flows), an exclusive right of fishery may be established by proof of a grant or prescription,<sup>2</sup> but it is subject to the qualification that it cannot be so used as to injure private rights of others; nor extend so far as to impede the passage of fish up the river, by means of dams or other obstructions.<sup>3</sup>

§ 222. **In navigable Waters a public Right. — Aliter in Streams not navigable, unless by Prescription.** — The private right of fishery is confined to fresh-water rivers, above tide-water, unless a special grant or prescription is shown; but the right of fishing in the sea, or in a bay or arm of the sea, and also

<sup>1</sup> Hooker v. Cummings, 20 Johns. 90.

<sup>2</sup> Gould v. James, 6 Cow. 369; Brookhaven v. Strong, 1 S. C. 415; Rogers v. Jones, 1 Wend. 237.

<sup>3</sup> People v. Platt, 17 Johns. 195; *Ex parte* Jennings, 6 Cow. 518; Comm'rs v. Kempshall, 26 Wend. 404; People v. Tibbets, 19 N. Y. 523; Berry v. Carle, 3 Greenl. 269; Scott v. Willson, 3 N. H. 321; Commonwealth v. Charlestown, 1 Pick. 180; Adams v. Pease, 2 Conn. 481; Browne v. Kennedy, 5 Har. & J. 195.



in navigable or tide waters, is a right public and common to every one; and no individual can appropriate to himself an exclusive privilege in navigable waters, or in an arm of the sea, without showing a grant or prescription for the same.<sup>1</sup> But no person has at common law a right of going over another man's land for the purpose of fishing, or of crossing the grounds of an individual lying upon the beach or sea-shore, on foot, or otherwise, in order to bathe in the sea, as against the owner of the soil of the shore.<sup>2</sup> The legislatures of the several States have assumed the regulation of the passage and protection of fish, in streams not navigable in the technical sense. And it is now considered that fisheries are, as at common law, the exclusive right of the owners of the banks of rivers not navigable, unless otherwise appropriated by statute; and that the right, unless secured by a particular grant or prescription, is held subject to legislative control.<sup>3</sup> But by force of a grant, or by prescription, a person may have an exclusive right of fishery, even in an arm of the sea, or in a navigable river, where the tide ebbs and flows. Thus, a patent to the inhabitants of a town, conveying all lands under water within the bounds of the grant, together with the exclusive right of fishing in the waters of the same, confers this right as the common property of the town, and may be regulated by rules adopted at the town-meeting.<sup>4</sup>

§ 223. **Rights of Abutters on navigable Waters.** — Although the right of fishing in a navigable river is a common right,

<sup>1</sup> *Arnold v. Mundy*, 1 Halst. 1; *Martin v. Waddell*, 16 Pet. 400; *Parker v. Cutler Man. Co.*, 20 Me. 353; *Carter v. Murcot*, 4 Burr. 2162; *Mayor v. Richardson*, 4 T. R. 437. A riparian proprietor on the bank of the Hudson River has no better right to the use of the soil between high and low water mark than any other person. *Gould v. Huds. River R. R.* 6 N. Y. 522.

<sup>2</sup> *Blundell v. Catterall*, 5 B. & A. 268. A right of fishing in any water gives no power to erect huts on the land for that purpose. *Cortelyou v. Van Brundt*, 2 Johns. 357.

<sup>3</sup> *Stoughton v. Baker*, 4 Mass. 527; *Nickerson v. Brackett*, 10 *id.* 212; *Waters v. Lilley*, 4 Pick. 145; *Vinton v. Welsh*, 9 *id.* 87; *Cottrill v. Myrick*, 8 Fairf. 222; *Lunt v. Hunter*, 16 Me. 1.

<sup>4</sup> *Rogers v. Jones*, 1 Wend. 237.



the adjoining proprietors have the exclusive right of drawing a seine and taking fish on their own land; and if an island, or a rock in tide-waters, be private property, no person but the owner has the right to use it for the purpose of fishing.<sup>1</sup> It may be observed, also, that in Pennsylvania the doctrine which holds no rivers to be navigable, so as to confer the common right of fishery, except those where the tide ebbs and flows, is not applicable to the great rivers of that State; and that the owners of land on the banks of such rivers as the Delaware and Susquehanna, so far as they are common highways, have no exclusive right of fishing opposite their respective lands. The right to such fisheries is declared to be vested in the State, and open to all the world.<sup>2</sup> A similar exception to the common-law rule has been suggested to exist in North and South Carolina, and probably in other States.<sup>3</sup> The property which the law gives, in river-fish uncaught, is of that kind which is called special or qualified property, and is derived out of the right to the place or soil where such fish live: a man has a special property in them so long as they are upon his land, or in the water which flows over it; but he loses such property the moment they resort to the soil or water of another. However, if an individual plants a bed of oysters, even in a bay or an arm of the sea, and marks it out by stakes, it is held to be no interference with the common right of fishing in such bay, and he acquires a qualified property in such oysters, sufficient to enable him to maintain trespass against any person who invades such property.<sup>4</sup>

(d.) *Watercourses.*

§ 224. **Natural Rights of Owner of the Soil in.**—With respect to the use of water, every proprietor of land through which a natural stream of water flows, has a right to the advantages of that stream, flowing in its natural course, and to use it, for

<sup>1</sup> *Lay v. King*, 5 Day, 72; *Commonwealth v. Shaw*, 14 S. & R. 9.

<sup>2</sup> *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. 71.

<sup>3</sup> *Ex'ors v. Waddington*, 1 McCord, 580; *Collins v. Benbury*, 3 Ired. 277.

<sup>4</sup> *Fleet v. Hegeman*, 14 Wend. 42.

any reasonable purpose not inconsistent with a similar right in the proprietor of the land above and below. He may detain it, by means of a dam, long enough for a profitable enjoyment of it; and is entitled to have the whole of it pass through his land, though he may not require the whole or any part of it for the use of machinery.<sup>1</sup> But if, after having applied it to some purpose of utility, he is interrupted in doing so by a diversion of the water, he has no right of action against the person diverting it, unless he has had an exclusive occupation for a sufficient length of time to raise a presumption of a grant to use it to the detriment of others.<sup>2</sup> He has no absolute property in the water of such a stream, and therefore he cannot, without the consent of other proprietors, divert or diminish the quantity of water which would otherwise descend to the proprietor below,<sup>3</sup> or throw the water upon the

<sup>1</sup> *Crooker v. Bragg*, 10 Weud. 260; *Van Hoesen v. Coventry*, 10 Barb. 518; *Holden v. Lake Co.*, 53 N. H. 552; *Bealey v. Shaw*, 6 East, 208. Where hydraulic privileges are created by conducting a stream across lands in an artificial channel, the proprietors of lots crossed by it, in the absence of any stipulation to the contrary, have the same rights to the use of the water on their respective lots as between themselves, as would exist if the artificial were the natural channel of the stream. *Townsend v. McDonald*, 12 N. Y. 381.

<sup>2</sup> *Mason v. Hill*, 5 B. & Ad. 23; *Frankum v. Falmouth*, 6 C. & P. 529; *Hatch v. Dwight*, 17 Mass. 289; *Strickler v. Todd*, 10 S. & R. 63; *Hazard v. Robinson*, 3 Mason, 272. And see *Platt v. Johnson*, 15 Johns. 213; *Merritt v. Brinkerhoff*, 17 *id.* 306.

<sup>3</sup> *Marshall v. Peters*, 12 How. Pr. R. 218. Nor can he appropriate the ice formed therein to his own exclusive use. In *W. Roxbury v. Stoddard*, 7 Allen, 158, an action was brought against persons who cut ice from Jamaica Pond, the fee of the land under said pond being vested in said town, for public uses. The court held that fishing, fowling, boating, bathing, skating, or riding upon the ice, taking water for domestic or agricultural purposes, or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds, to all persons who own land adjoining them, or can obtain access without trespass, so far as they do not interfere with the reasonable use of the pond by others, or where the legislature has not otherwise directed; that the town of West Roxbury had no such property in the ice on Jamaica Pond as would enable it to maintain this action, even if the fee of the pond be considered to be in the town; and that the remedy for any unreasonable or excessive use of the liberty of cutting ice, being the violation of a public right, is by indictment; and the towns may regulate the use of the ponds by reasonable

proprietor above, without a grant, or an uninterrupted enjoyment of such a privilege for twenty years, which is equivalent to a grant.<sup>1</sup> And where a spring of water rises upon the land of one person, and from it flows a stream to the land of another, the owner of the land where the spring rises has no right to divert the stream from its natural channel; although the waters of the stream are not more than sufficient for his domestic uses, his cattle, and the irrigation of his land.<sup>2</sup> To establish a right to a watercourse, it must appear that the water usually flows in a certain direction, and by a regular channel, with banks or sides; but it need not flow continually, and may at times be dry, yet it must have a well-defined and substantial existence.<sup>3</sup> A riparian proprietor cannot erect a dam above the mill of another, by which the water is diverted from its accustomed channel, so as to affect the regularity of the supply, though there is no waste of water, and notwithstanding it may be returned to its ordinary channel long before

by-laws, adopted and approved according to statute. If these are insufficient, resort must be had to the legislature. That ice, after it has been stored for domestic use, may be property, see *Ward v. People*, 6 Hill, 144. In *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229, it was held that a lessee of riparian rights on a navigable stream might enclose and store ice for his own use and profit, within the limits embraced in his lease, so long as he did not thereby interfere with the navigation or proper use of the stream.

<sup>1</sup> *Belknap v. Trimble*, 3 Paige, 577; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Belknap v. Belknap*, *id.* 463; *Merritt v. Parker*, 1 Cox, 460; *Dumont v. Kellogg*, 29 Mich. 420; *Bucklin v. Truell*, 54 N. H. 122; *Wright v. Howard*, 1 Sim. & S. 190; *Bealey v. Shaw*, *supra*; *Magor v. Chadwick*, 11 Ad. & E. 571. Even for the purpose of repairing his own mill. *Van Hoesen v. Coventry*, *supra*. Nor can he justify a diversion on the ground that if the other party would make a better dam, there would still be left enough water to supply his mill. *Crooker v. Bragg*, 10 Wend. 260.

<sup>2</sup> *Arnold v. Foot*, 12 Wend. 330. And after having changed the natural flow of the water, and continued such change for twenty years, he will not be permitted to restore it to its natural state, to the prejudice of mills which have been erected with reference to such change. *Belknap v. Trimble*, *supra*.

<sup>3</sup> *Wagner v. L. I. R. R.*, 2 Hun, 633; *Barnes v. Sabron*, 10 Nev. 217. It does not include mere occasional flows of surface-water. *Eulrich v. Richter*, 37 Wisc. 226.

it reached the other's mill.<sup>1</sup> Nor, unless he has acquired such a right by prescription, will he be permitted to corrupt a running stream of water, to the prejudice of his neighbor.<sup>2</sup>

§ 225. **Rights in, not to be used Unreasonably or Injuriously.**—And supposing a person to have acquired a certain exclusive right to the enjoyment of water, he will not be permitted to make use of that right in an unreasonable manner, so as sensibly to affect the application of it by his neighbors below who are on the stream; as by shutting the gates of his dams, detaining the water unreasonably, and then letting it off in unusual quantities, to the annoyance of his neighbor.<sup>3</sup> Nor has he a right by the erection of a dam to create a reservoir for the storage of water for future use in a dry season, though no special injury may be sustained by an adjoining proprietor.<sup>4</sup> Neither can he divert the water into artificial channels, for purposes of irrigation, to an unreasonable extent, or so as to materially diminish the quantity that has been accustomed to flow to other riparian proprietors.<sup>5</sup> And, in general, it may be stated that, where two or more persons are entitled to a common use of water, the upper proprietor will be answerable for damages if he does not afford the lower one a fair and

<sup>1</sup> *Sackrider v. Beers*, 10 Johns. 241; *Shears v. Wood*, 7 Moore, 345; *Mason v. Hill*, 5 B. & Ad. 1; *Wright v. Howard*, *supra*; *Hammond v. Fuller*, 1 Paige, 197.

<sup>2</sup> *Howell v. McCoy*, 3 Rawle, 269; *Thomas v. Brackney*, 17 Barb. 654; *Carhart v. Aub. Gas Co.*, 22 *id.* 297, as, by rendering it unwholesome for cattle. *Gladfelter v. Walker*, 40 Md. 1; *Richm. Man. Co. v. Atlantic D. Co.*, 10 R. I. 106. The grant of an undivided share of a stream does not authorize its use, to the injury of others jointly interested in it. The property in a stream of water is indivisible; and it must be used as an entire stream in its natural channel. *Vandeburgh v. Van Bergen*, 13 Johns. 212.

<sup>3</sup> *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; *Beissell v. Sholl*, 4 Dall. 211; *Colburn v. Richards*, 13 Mass. 420; *Runnels v. Bullen*, 2 N. H. 532.

<sup>4</sup> *Clinton v. Myers*, 46 N. Y. 511. Such a proprietor may insist on his legal rights without regard to the question of damages. *Id.*

<sup>5</sup> *Cook v. Hull*, 3 Pick. 269, explaining *Weston v. Alden*, 8 Mass. 136; *Union Mills Co. v. Ferris*, 2 Sawyer, 176.

reasonable participation in its use;<sup>1</sup> but that no action can be sustained by one riparian proprietor against another for erecting a dam on the stream, whereby the water is raised along the plaintiff's land above its natural level, without proof of special damage.<sup>2</sup>

§ 226. **Right to accumulate and store Water.** — It has generally been held that if an owner builds a dam upon his own premises, and thus holds back and accumulates water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or reservoir give way and the lands of a neighbor are thus flooded, he is not liable for damage without proof of some fault or negligence on his part.<sup>3</sup> Thus where one built a mill-dam upon a proper model, and the work was well and substantially done, he was held not liable to an action though it broke away, in consequence of which his neighbor's dam and mill below were destroyed; and that negligence must be shown either in the construction of the dam or in not keeping it in repair to render him liable.<sup>4</sup> But it has recently been held in England that a man, merely by bringing upon his land an artificial body of water, is liable for any injury its escape may cause, though there is no negligence on his part; and this doctrine has been approved in some States.<sup>5</sup> Where a dam is erected upon an ancient stream to

<sup>1</sup> *Merritt v. Brinkerhoff*, 17 Johns. 306; *Pollitt v. Long*, 56 N. Y. 200. Mere inconvenience in his business is not a cause of action, if the interception of the water does not extend to the destruction or diminution of the uses of the plaintiff's mill: *Palmer v. Mulligan*, 3 Caines, 307; nor an imperceptible theoretical injury: *Thompson v. Crocker*, 9 Pick. 59.

<sup>2</sup> *Garrett v. McKie*, 1 Rich. 444.

<sup>3</sup> *Lapham v. Curtis*, 5 Vt. 371; *Shrewsbury v. Smith*, 12 Cush. 177; *Bailey v. Mayor*, 3 Hill, 531; s. c. 2 Den. 433; *Pixley v. Clark*, 35 N. Y. 520; *Sheldon v. Sherman*, 42 *id.* 484.

<sup>4</sup> *Livingston v. Adams*, 8 Cow. 175.

<sup>5</sup> *Rylands v. Fletcher*, L. R. 3 H. L. 830; *Shipley v. Fifty Assoc.*, 101 Mass. 251. But it is held, distinguishing the case from *Rylands v. Fletcher*, *supra*, where the water is brought upon the premises for the benefit of tenants, that the landlord, in case of resulting injury to one of the tenants, is not liable to such tenant as for a breach of the covenant for quiet enjoyment contained in the lease. *Anderson v. Oppenheimer*, 5 Q. B. D. 602.

obtain a head of water for the use of one of the State canals, the surplus waters of the stream which are not wanted for public use, and which continue to flow over the dam and down the ancient channel, belong to the owners of water-rights upon the margin of the stream below, in the same manner as if the State dam had not been erected; and a lessee of the surplus waters of the canal cannot divert them to the injury of the proprietors of mill-privileges on the stream below. No person, however, except by authority of the legislature, or of the authorized agents of the State, has a right to tap the State dam and draw off the surplus waters of the artificial pond, which is created by such a dam for public purposes.<sup>1</sup>

§ 227. **Right to injurious Enjoyment may arise by Grant or Prescription, but not otherwise.** — The right to the enjoyment of this easement, like that of any other, may be controlled by a grant, or by prescription, which supposes a grant; for though the stream be diminished in quantity, or injured by the exercise of certain trades, yet if the party using it has enjoyed his occupation in a similar way for twenty years, he has acquired a prescriptive right to such use, and the party below must take the stream subject to the adverse right; it having been repeatedly held that the exclusive enjoyment of water in a particular way for twenty years without interruption becomes an adverse enjoyment sufficient to raise a presumption of title, as against a right in any other person, which might have been but was not asserted.<sup>2</sup> Subject to this restriction, however, the owner of an ancient mill may lawfully enter the close of another and remove a dam erected thereon by which the water of the stream below his mill is made to flow back and prevent it from working.<sup>3</sup> So he may

<sup>1</sup> *Varick v. Smith*, 5 Paige, 137.

<sup>2</sup> *Campbell v. Smith*, 3 Halst. 139; *Cooper v. Smith*, 9 S. & R. 26; *Sherwood v. Burr*, 4 Day, 244; *Brown v. Best*, 1 Wils. 174; *Barker v. Richardson*, 4 B. & A. 59; *Cross v. Lewis*, 2 B. & C. 686; *Livett v. Wilson*, 3 Bing. 115. And the right does not relate to the purpose for which the water is to be used, but to the manner and extent of the diversion. *Smith v. Adams*, 6 Paige, 435; *Belknap v. Trimble*, *supra*.

<sup>3</sup> *Hodges v. Raymond*, 9 Mass. 316.

enter upon the land of a riparian owner, above his mill, and remove a dam unlawfully erected there to irrigate the latter's land, the stream being thereby stopped to such an extent as to render the mill below useless.<sup>1</sup> And if a mill-dam across an unnavigable stream is so erected or managed as to become prejudicial to the health or comfort of others, it becomes a nuisance.<sup>2</sup> A court of equity will by injunction prohibit the obstruction of watercourses, diversion of streams from mills, back-flowage upon them, and other injuries of like kind, which from their nature cannot be adequately compensated by damages at law.<sup>3</sup>

§ 228. **Prescriptive Right, how acquired.** — But it is not necessary that the person claiming the right should have used it in precisely the same manner during the whole time of its enjoyment, or that it should have been used to propel the same machinery; all that the law requires is, that the mode or manner of using the water shall not have been materially varied to the prejudice of others. Therefore, if a proprietor at the head of a stream has changed the natural flow of the water, and continued the change for more than twenty years, he cannot afterwards be permitted to restore it to its natural state, when it would have the effect of destroying the mills of other proprietors below, which have been erected in reference to such change in the natural flow of the stream.<sup>4</sup> And if a man has had the use of water at a given height for twenty years, a grant will be presumed of the privilege of using it at that height, and nothing more; and if he repairs his dam, which has kept the water at that height, so as to raise the water still higher, and cause it to flow back upon his neighbor's mill, he is liable to an action, though the dam itself may

<sup>1</sup> Colburn v. Richards, 13 Mass. 420. And see Curtis v. Jackson, *id.* 507; Sumner v. Tileston, 7 Pick. 198.

<sup>2</sup> State v. Close, 35 Iowa, 570.

<sup>3</sup> Sanborn v. Covington Co., 2 Md. Ch. 409; Bemis v. Upham, 13 Pick. 169.

<sup>4</sup> 3 Kent, Com. 442; Belknap v. Trimble, *supra*; Blanchard v. Baker, 8 Greenl. 253; Hazard v. Robinson, 3 Mason, 272.



remain at its ancient height; for the question is not as to the height of the dam, but of the water.<sup>1</sup>

§ 229. **Streams as Boundaries. — Rights of Abutters.** — A grant of land, bounded upon a stream or river where the tide does not ebb and flow, carries the right of the grantee to the middle of the stream, unless the language of the grant is clearly such as to show the intent of the parties to be that it should not extend beyond the water's edge. If the stream is navigable for either boats or rafts, the public have a right to use it for those purposes, and the rights of the adjoining proprietors are subject to the public easement.<sup>2</sup> They may use the water, or the land under the water, in any manner which does not impair its use as a public highway; but they cannot erect dams, or place other obstructions in the stream, which will interfere with its free and convenient use for public purposes. Nor can the State divert the water of the stream, or interfere with it in any other manner that will render it less useful to the proprietors of the adjacent shores, without making full compensation.<sup>3</sup> A prescriptive right to a public towing-path

<sup>1</sup> *Stiles v. Hooker*, 7 Cow. 266. The mere omission by one proprietor to make use of a right which belongs to him, however long continued, will not prejudice him, or confer any right upon the adjoining proprietors. *Townsend v. McDonald*, 12 N. Y. 381; *Crooker v. Bragg*, *supra*; *Bealey v. Shaw*, 6 East, 208. And the constant use of a stream, for the purposes of a mill, does not deprive the proprietor above of the right to make a reasonable use of the waters for like purposes, although he may thereby disturb the natural flow of water to the lower mill. *Thurber v. Martin*, 2 Gray, 394. And see *Chandler v. Howland*, 7 Gray, 848, 850; *Smith v. Agawam Canal Co.*, 2 Allen, 355, 357.

<sup>2</sup> *Adams v. Pease*, 6 Conn. 461; *Claremont v. Carlton*, 2 N. H. 369; *King v. King*, 7 Mass. 496; *Hay v. Bowman*, 1 Rand, 417; *Berry v. Carle*, 3 Greenl. 269; *Morrison v. Keen*, *id.* 474; *Ingraham v. Wilkinson*, 4 Pick. 268; *Arnold v. Mundy*, 1 Halst. 1; *Gavit v. Chambers*, 3 Ohio, 495; *Brown v. Kennedy*, 5 Har. & J. 195; *People v. Seymour*, 6 Cow. 579; *Hooker v. Cummings*, 20 Johns. 90. Rivers of sufficient capacity to float to market the products of the country are public highways. 3 Kent, Com. 411; *Browne v. Schofield*, 8 Barb. 239. A river is deemed navigable, as far as the tide rises and falls, though the water be fresh. *People v. Tibbets*, 19 N. Y. 523.

<sup>3</sup> *People v. Canal App.*, 13 Wend. 355; *Ex parte Jennings*, 6 Cow. 548.



on the bank of a navigable river is not destroyed in consequence of an act of the legislature which converts that part of the river adjoining a towing-path into a floating harbor; and if either the water, or the improvement, impairs the facility of passing along the bank, the public have a reasonable way over the nearest part of the next field.<sup>1</sup>

§ 230. **No prescriptive Right in Subterranean Waters.**— It has been questioned whether the right to the enjoyment of an underground spring, or of a well supplied by such a spring, was governed by the same rule of law as that which regulates watercourses flowing on the surface. But in an action on the case for damage sustained by the loss of water from a well, in the plaintiff's close, occasioned by the defendant's digging a coal-pit about three-quarters of a mile off, — the well having been constructed for twenty years, and used for working a cotton-mill, — Chief Justice Tindal, after stating that the rule which governs the case of streams running in their natural courses either assumes for its foundation the implied assent and agreement of the proprietors of the different lands, or may be considered as a rule of positive law, concludes there could be no ground for inferring any mutual consent or agreement for ages past between the owners of the several lands beneath which underground springs exist, and, consequently, no trace of positive law could be inferred from long-continued acquiescence; and that, therefore, the case did not fall within the rule which obtains, as to surface streams, but rather within that principle which gives to the owner of the soil all that lies beneath its surface, — the damage occasioned to another by the exercise of such a right being considered *absque injuria*.<sup>2</sup> And in Maine it was held that one who digs a well

<sup>1</sup> *Ball v. Herbert*, 3 T. R. 258; *Rex v. Tippet*, 3 B. & A. 193. Persons navigating public waters may use docks erected upon them, without the owner's express permission. Therefore the owner of a dock cannot terminate the occupancy by setting the vessel adrift so as to endanger its safety, until after request to remove, and neglect to do so in reasonable time. *Heeney v. Heeney*, 2 Den. 625.

<sup>2</sup> *Acton v. Blundell*, 12 M. & W. 824. The principle of this case is cited with approbation by Chief Justice Bronson, in giving the opinion of the court in *Radcliff v. Mayor*, 4 N. Y. 200; and its doctrine has since

on his own land, in good faith, to obtain water for domestic use, is not liable for a consequent diversion of unknown subterranean currents from the spring of an adjoining owner. The maxim *cujus est solum*, and not *sic utere tuo*, being applicable to such a case.<sup>1</sup>

(e.) *Removal of Adjoining Building.*

§ 231. **With ordinary Care, Owner not liable for Injury to Abutters.** — In general a man may use his land for any purpose to which it is adapted, without being accountable to any person therefor, if he uses ordinary care and skill to avoid injury to his neighbor.<sup>2</sup> And if, whether landlord or tenant, he finds it necessary to pull down a house, and gives due notice to the owner of the adjoining building of his intention, as well as of the time he proposes to commence work, he is not answerable for any injury its owner may sustain by the operation, provided always that he removes his own with reasonable and ordinary care.<sup>3</sup> The owner of the premises adjoining

been followed in *Ellis v. Duncan*, 29 N. Y. 466. See also *Delhi v. Youmans*, 45 *id.* 362. In a case where mines were excepted out of a demise of the surface land, it has been held in England that the rights of the respective proprietors of the surface and of the mines did not differ in any way from those of the owners of adjoining closes, who are strangers in title, each of whom is entitled to the water found upon his land, but neither of whom is entitled to complain of that water by natural percolation set in motion by his neighbor's excavations; for it made no difference whether the respective closes are adjacent vertically or laterally, and the grant of the surface could not carry with it more than the ownership of the entire soil would have done. *Ballacoshish Silv. Co. v. Dumbell*, 29 L. T. N. S. 658. The rule that a mine-owner must protect himself against water flowing from a neighboring mine, in the ordinary course of mining operations, has no application to a case where the consequence of a man's mining operations is the tapping of a river bed, and the precipitating of the water of the river into his own mine, and thence into that of his neighbor; and an injunction was allowed to stop such extraordinary operations in *Crompton v. Lea*, 31 L. T. N. S. 469, per V. C. Hall. And see *Waffle v. N. Y. Cent. R. R. Co.*, 53 N. Y. 11.

<sup>1</sup> *Chase v. Silverstone*, 62 Me. 175.

<sup>2</sup> *Radcliffe v. Brooklyn*, 4 N. Y. 195; *Panton v. Holland*, *supra*.

<sup>3</sup> *Thurston v. Hancock*, 12 Mass. 220; *Panton v. Holland*, 17 Johns. 92; *Peyton v. Mayor*, 9 B. & C. 725; *Massey v. Goyder*, 4 C. & P. 161. The

those pulled down must, after receiving notice, shore up his own building, and do every thing proper to be done for its preservation; and if he neglects to take such precaution, he is without remedy for any injury it may sustain, unless it clearly appears, that the pulling-down by the other party was done in so wasteful, negligent, or improvident a manner, as to occasion greater risk than, in the ordinary course of doing the work, ought to have been incurred.<sup>1</sup>

§ 232. **Question of Fact whether due Care is Exercised.** — Whether due caution has been used in the removal is, in every case, a question of fact for a jury, depending upon its own peculiar circumstances. In a recent case, where the action was brought for digging the foundation of an intended building, on a piece of land next adjoining the house of the plaintiff, so carelessly that the walls and foundations of the plaintiff's house gave way and sank, it appeared on the trial that the defendants excavated their own ground about six feet deep, and came within about four feet from the plaintiff's house. After the excavation, the plaintiff's gable wall bulged, and the defendants made an ineffectual attempt to shore it up; but it gave way in all directions, and it became necessary to rebuild. The case was held to turn upon the question, whether the fall of the wall was occasioned by the defendants' negligence, or by its own infirmity; and that, in inquiring whether the injury was owing to the neglect of the defendants, the state of the premises must be taken into consideration by the jury, that if the wall was so infirm as to be unable to sustain itself six months longer, still the defendants had no right

provision of the laws of New York of 1855, that when a person excavating, &c., on his lot, in the city of New York, is given a license by the adjoining owners to enter on their land to protect their buildings from injury by the excavation, he must so protect them,—does not impose any duty upon a landlord, as towards his tenant, to secure protection for the tenement by giving such license. *Sherwood v. Seaman*, 2 Bosw. 127. See Laws of New York of 1855, 11, c. 6, as to how party and other walls in New York and Brooklyn are to be supported during excavations.

<sup>1</sup> *Walters v. Pfeil*, Mood. & M. 364; per *Ld. Tenterden*, in *Massey v. Goyder*, *supra*; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Dodd v. Holme*, 1 Ad. & E. 493.

to accelerate its fall, and that such a state of the wall would render more care necessary on the part of the defendants not to hasten its dissolution.<sup>1</sup> So, in an action on the case, for negligently and carelessly excavating the defendant's own land, and thereby withdrawing the support from the plaintiff's house, which the declaration alleged it was entitled to, it appeared that, for about twenty-six years, the plaintiff had rested his house upon a wall belonging to the defendant, by permission originally from the defendant, and that, by excavating too near his wall, the defendant had caused it to sink, and thereby injured the plaintiff's house, which rested against it; upon a special verdict of the jury, that the excavation was made in a careless and unskilful manner, the court sustained the action.<sup>2</sup>

(f.) *Right to Support from Neighboring Soil and Buildings.*

§ 233. **Attaches to Land but not to Buildings thereon, unless ancient.** — Neither is a proprietor of land at liberty to dig and mine at pleasure on his own soil, without considering what effect such excavations must produce upon the land of his neighbor, since the withdrawal of the lateral support would, in many cases, cause the falling-in of the adjoining land; and the violation of this right of support, which is an easement necessarily attached to the soil, will not only be compensated by an action for damages, but may also be restrained by in-

<sup>1</sup> *Dodd v. Holme*, *supra*; *Pierce v. Musson*, 17 La. 389. In *Trower v. Chadwick*, 3 Bing. 334, it was held to be a good ground of action, that the defendant conducted himself so negligently and unskilfully in pulling down his own wall, as by reason thereof to injure his neighbors. As to liability for negligence, see *ante*, § 199, and note.

<sup>2</sup> *Brown v. Windsor*, 1 Cr. & J. 20; and see *Haines v. Roberts*, 7 Ellis & B. 625. Where the defendant permitted another person to remove earth from a hill on defendant's land, and it was so negligently done that earth slid from the hill upon plaintiff's land, the defendant was held liable for the injury, upon the general principle that he was bound to control the use of his own premises so as not to produce injury to others. *Mayor v. Bailey*, 2 Den. 445. It is to be intended that the owner has control over those who work upon his premises; and he cannot discharge himself from that intendment of law by any act or contract of his own. *Gardner v. Heartt*, 1 *id.* 466.

junction.<sup>1</sup> A man may excavate a canal, or dig on his own land, but not so near that of his neighbor as to cause the land of the latter to fall into his pit, thus transferring a portion of another man's land to his own.<sup>2</sup> He may excavate and move his own soil, for a lawful purpose, but must not thereby remove the natural support of his neighbor's land, so that it cannot stand by its own coherence. For if it subsides and falls into the pit made by his excavations, disturbing his neighbor in the enjoyment and possession of his property, and causing him damage, the law will hold the wrong-doer responsible for the consequences, provided his neighbor has done nothing on his own land, which contributed to produce the injury, or in hostility to the legitimate and proper exercise of the other's paramount right to improve his own premises.<sup>3</sup> But if any thing has been done to increase the lateral pressure, as where a building has been erected, he has no right to the increased support necessary to sustain such a building, unless it is of ancient erection.<sup>4</sup> If his house has stood twenty years without adverse claims, it has acquired the rights of an ancient house, by prescription; and though without negligence on the part of the excavator, it cannot then be lawfully disturbed by

<sup>1</sup> *Farrand v. Marshall*, 21 Barb. 409; s. c. 19 *id.* 380; *Rowbotham v. Wilson*, 8 Ellis & B. 123.

<sup>2</sup> Roll. Abr. Trespass, I. pl. 1. In estimating the damages sustained by a tenant for years, whose possession has been injured by a wrongful excavation on the adjoining premises, the jury will take into account the expense necessary to restore the building to such a state as would make the possession as beneficial to the tenant as it was before the trespass was committed; but the allowance must not exceed the value of the plaintiff's term, taking into view the rent reserved. *Walter v. Post*, 6 Duer, 363; and see *Gourdier v. Cormack*, *supra*.

<sup>3</sup> A court of equity has power to restrain a land-owner from excavating or removing soil from his land, adjoining the land of another, if the effect of such excavation and removal will be to cause the land of his neighbor, by reason of the withdrawal of its natural support, to fall away or subside. Per Wright, J., in *Farrand v. Marshall*, *supra*.

<sup>4</sup> Lord Tenterden, in *Wyatt v. Harrison*, 3 B. & Ad. 875. In the city of New York, the foundation of every building must be not less than ten feet below the street, or sidewalk directly in front of it; and if not, the owner will not be entitled to recover damages, by the erection, with ordinary care, of an adjoining building. Laws of New York, 10 April, 1818.

deep excavations, or other improvements on adjoining lots. But, otherwise, a person may make reasonable improvements and excavations on his own ground, though they should injure or endanger an edifice on the adjoining land, by digging near and deeper than its foundations; provided he exercises ordinary care and skill, and provided further that the injured party does not possess any special privileges which protect him from the consequences of such improvements, either by prescription or by grant.<sup>1</sup> And in a case where a man had built to the extremity of his soil, and enjoyed the building above twenty years, Lord Ellenborough held, upon analogy to the rule as to light and air, that he had acquired a right to support, or, as it were, of leaning to his neighbor's soil, so that his neighbor could not dig so near as to remove the support; but that it was otherwise of a house newly built.<sup>2</sup>

§ 234. **Ancient Erections, when not entitled to Support.** — But a house will not have the privilege of support as an ancient erection, if it appears to have been built upon ground previously excavated. In a recent case the plaintiff was possessed of two houses, one an ancient house, and the other built within twenty years, upon his own land, and considerably within his own boundary; and the defendants excavated so near their boundary as to cause damage to the plaintiff's buildings, one of which stood upon ground which had been previously excavated. The court held, that if a man builds his house at the extremity of his land, he does not thereby acquire any right of easement for support, or otherwise, upon

<sup>1</sup> *Lasala v. Holbrook*, 4 Paige, 169; *Richart v. Scott*, 7 Watts, 460; *Thurston v. Hancock*, 12 Mass. 220; *Story v. Oden*, *ib.* 157.

<sup>2</sup> *Callendar v. Marsh*, 1 Pick. 434; *Stansell v. Tollard*, 1 Selw. N. P. 444; *Wyatt v. Harrison*, *supra*. And where one of two buildings having a party-wall common to both becomes so dilapidated as to be unsafe and unfit for occupation, and the owner, after giving reasonable notice of his intention to the tenant of the adjoining building, proceeds to take down the whole wall for the purpose of rebuilding it, he is not responsible to the tenant of the adjoining building for any damages resulting from its exposure to weather or other causes, if he consumes no unnecessary time in completing the work, and uses proper care and skill in its execution. *Partridge v. Gilbert*, 15 N. Y. 601.

the land of his neighbor ; that he has no right to load his own soil so as to make it require the support of that of his neighbor, unless he has some grant to that effect ; and that if the land, on which the plaintiff's house was built had not been previously excavated, the defendants might, without injury to the plaintiff, have excavated to the extremity of their land. It was further held that if the plaintiff had not built his house on excavated ground, the mere sinking of the ground would have been without injury ; that he had, by building on ground insufficiently supported, caused the injury to himself without the defendant's fault ; unless, at the time, by some grant, he was entitled to additional support from the land of the defendants. That there were no circumstances in the case from which to infer any such grant ; as to the new house, because it had not stood twenty years, nor, as to the old house, because, though erected more than twenty years since, it did not appear that the earth under it might not have been excavated within twenty years. And that no grant could, at all events, be inferred, nor could the right to any easement become absolute, until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the defendant's land.<sup>1</sup>

§ 235. **Dominant Estate to be kept in Repair.** — There is also a condition imposed upon the party entitled to support, that he shall do nothing to increase the burden imposed upon his neighbor, by neglecting to keep his premises in sufficient repair. When the owner of a lot builds upon it, he builds at his own peril ; and cannot, although building upon his own ground, deprive any other party of the use of his, in such manner as he or they shall deem most advantageous.<sup>2</sup> If,

<sup>1</sup> *Partridge v. Scott*, 3 M. & W. 220. In all that class of cases where the mode of enjoyment is turned into an absolute right by custom, grant, or prescription, the party is entitled to protection against any alteration of the adjacent premises, by which he may in any way be injured. Per Gardner, J., in *Hay v. Cohoes Co.*, 2 N. Y. 159.

<sup>2</sup> *Thurston v. Hancock*, 12 Mass. 221. But the right to the support of the land immediately around a house is not in the nature of an easement, but is the ordinary right to the enjoyment of property ; and till that is interfered with, the party has no legal ground of complaint, although in



in making an excavation, the adjoining building falls in consequence of its infirm condition, even if, in the ordinary progress of decay, it would have fallen in a short time, the neighbor had still no right to accelerate its fall, by carelessly removing its support; and a plaintiff may recover in proportion to the loss actually sustained, when it is proved that the injury to the house was the consequence of the defendant's negligence.<sup>1</sup> In an action against an adjoining owner for carelessly digging too near the division wall, while deepening his own cellar, it was held that the plaintiff was entitled to recover such damages as would be sufficient to reinstate the wall and the house in as good condition as they were prior to the injury, and also to compensate him for the loss consequent upon the interruption of his business.<sup>2</sup>

§ 236. **Servient Estate, User of subject to the Easement.** — Where a party is entitled to support from his neighbor's building, the premises can only be used in subjection to such easement. And it will be an invasion of that right if he does any injury to his neighbor's building in the pulling down of his own, although done with ever so much care. The same principle applies to land, for where there was a grant of the minerals under the land, and the defendant removed them in such a manner as to cause the surface of the earth to fall in, it was held to be a violation of the right of support, which the plaintiff was entitled to, however done.<sup>3</sup> For wherever the surface of land and the minerals under it belong to different proprietors, the owner of the surface is *prima facie* entitled to support from the subjacent strata, and the owner of the minerals in working them is bound to leave sufficient support for the surface in its natural state.<sup>4</sup> *A liberty to hang out linen*

fact something may have been done which has occasioned results that will afterwards affect his property. *Backhouse v. Bonomi*, 9 H. L. Cas. 503.

<sup>1</sup> Per Taunton, J., in *Dodd v. Holme*, 1 Ad. & E. 506. In determining the question of negligence, the jury ought to consider the state of the plaintiff's house. *Ib.*

<sup>2</sup> *Brown v. Werner*, 40 Md. 15.

<sup>3</sup> *Trower v. Chalwick*, 3 Bing. N. C. 334.

<sup>4</sup> *Smart v. Morton*, 5 Ellis & B. 30; *Humphries v. Brogden*, 15 Q. B. 739; *Wilms v. Jess*, 94 Ill. 464; *Yandes v. Wright*, 66 Ind. 319. Under



*to dry*, on lines passing over the soil of another, is an easement which is recognized in the books. But as the plaintiff, in the case referred to, claimed a liberty for himself and the other tenants to hang linen as often as they had occasion to do so, at their free will and pleasure, and the jury found that he had liberty to dry the linen of his own family only, he was nonsuited.<sup>1</sup>

(g.) *How an Easement may be Created or Extinguished.*

§ 237. **Arises from Agreement. — Adverse Possession.** — The origin of every easement in the land of another is to be referred to some agreement, express or implied. It can only be created by a grant or by prescription which supposes a grant; and uninterrupted possession for twenty years is held to be sufficient evidence from which a jury may presume a grant.<sup>2</sup> But in order that its enjoyment may be conclusive of the right, it must have been adverse, that is, under a claim of title injurious to the rights of the owner of the land, yet with his knowledge and acquiescence, and uninterrupted. The burden of proving this is on the party claiming, and if he leaves it doubtful in these particulars, it is not conclusive in his favor.<sup>3</sup> A mere license is not sufficient for the purpose of

a lease of mineral coal, with right to mine and remove the same, the lessee is not entitled to remove the whole of the coal without leaving sufficient support to maintain the surface in its natural state, unless the lease clearly implies that he is to have such right. *Davis v. Treharne*, 6 H. L. App. Cas. 460; *Burgner v. Humphrey*, 41 Ohio St. 340.

<sup>1</sup> *Drewell v. Towler*, 3 B. & Ad. 785.

<sup>2</sup> *Lasala v. Holbrook*, 4 Paige, 169; *Angell on Watercourses*, 77; *Townsend v. McDonald*, 12 N. Y. 381. Easement created by reservation or grant, may be enlarged by prescription. *Atkins v. Boardman*, 20 Pick. 302. Continuous adverse use of a way across another's land for twenty years may be established without direct evidence of its actual use during each year. *Bodfish v. Bodfish*, 105 Mass. 317.

<sup>3</sup> *Sargent v. Ballard*, 9 Pick. 251; *Borden v. Vincent*, 24 *id.* 301; *Powell v. Bagg*, 8 Gray, 443. The doctrine of continuity of possession required by the common law, as cited by Lord Coke from Bracton, has been adopted in Massachusetts. The possession must be long, continuous, and peaceable: long, that is, during the time required by law; continuous, that is, uninterrupted by any lawful impediment; and peaceful,

creating an easement, for a license is revocable, nor can an easement grow out of a mere permissive enjoyment for any length of time.<sup>1</sup> And where a man, for a valuable consideration, gives another the liberty to cut a drain, mine coal, or the like, on his premises, although it conveys no interest in the land itself, yet gives a claim to a freehold right, and cannot therefore be created without a deed.<sup>2</sup> So the right of permanently occupying one's own land in such a manner as to deprive the adjoining owner of an easement, cannot be acquired by a parol license, — such license being revocable, even after it has been executed.<sup>3</sup>

§ 237 *a*. **License defined. — How to be exercised. — Revocation of.** — A license is an authority to do some act or a series of acts on the land of another, without passing an estate in the land. It does not therefore trench upon that policy of the law which requires bargains respecting real estate to be in writing, and in general it amounts to nothing more than an excuse for an act which would otherwise be a trespass.<sup>4</sup> Of this character are permissions to remove a building, to cut

because if it be contentious, and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. There must be *longus usus, nec per vim, nec clam, nec precario*. Co. Lit. 113, b; Bracton, fo. 51, 52; Thomas v. Marshfield, 13 Pick. 238. And see Sumner v. Tileston, 7 id. 198. Whether the possession was adverse or not is a question for the jury, under instructions from the court. Putnam v. Banker, 11 Cush. 542.

<sup>1</sup> Baker v. Boston, 12 Pick. 184; Hill v. Hill, 113 Mass. 103, 107. Permission to pass and repass over a man's land, granted without consideration, does not prevent him from shutting up the fence at any time so that the grantee cannot pass. Dexter v. Hazen, 10 Johns. 246.

<sup>2</sup> Cook v. Stearns, 11 Mass. 533; Thompson v. Gregory, 4 Johns. 81; Harlan v. Lehigh Coal Co., 35 Pa. St. 287; Hays v. Richardson, 1 Gill & J. 386.

<sup>3</sup> Miller v. Aub. & S. R. R., 6 Hill, 61; Owen v. Field, 12 Allen, 457.

<sup>4</sup> Jackson v. Babcock, 4 Johns. 418; Prince v. Case, 10 Conn. 375; Mumford v. Whitney, 15 Wend. 380; Jamison v. Milleman, 3 Duer, 255. A license passes no interest, nor alters or transfers property in anything, but only makes an action lawful which without it would have been unlawful. Per Vaughan, C. J., in Thomas v. Sorrell, Vaughan, 351; Owens v. Lewis, 46 Ind. 489.

wood, to draw water, or to take gravel for road-making.<sup>1</sup> Being a mere personal privilege, it can only be enjoyed by the licensee himself, and is not therefore assignable so that an under-tenant can claim privileges conceded to a lessee.<sup>2</sup> It must be exercised within a reasonable time, as in case of a license to cut and carry away wood, since it applies to wood in substantially the state of growth in which it was when the license was given.<sup>3</sup> It is revocable so long as it remains executory, unless a definite term has been fixed for its continuance, or the licensee has expended money on the faith of it, and is in the enjoyment of privileges connected therewith.<sup>4</sup> A sale and conveyance of the land by the owner produces a revocation by mere operation of law.<sup>5</sup> But when executed, and the licensee has entered upon the land, and done that which he was authorized to do, it becomes irrevocable.<sup>6</sup> And this is equally so against a grantee from the owner.<sup>7</sup> And it is always a justification for acts done under it, while unrevoked; and the defendant may give it in evidence, to defeat

<sup>1</sup> A privilege to the tenant of one room to put signs on the outer wall is a license only, and not an easement or exclusive right. *Pevey v. Skinner*, 116 Mass. 129. But *Riddle v. Littlefield*, 53 N. H. 503, is *aliter*. And see *Rathbone v. McConnell*, 21 N. Y. 466; *Pierrpont v. Bernard*, 6 *id.* 279; *Dubois v. Kelly*, 10 Barb. 496; *Syren v. Blakeman*, 22 *id.* 336. The permit includes everything necessarily incident to its exercise. *Clark v. Vt. R. R.*, 28 Vt. 103.

<sup>2</sup> *Dark v. Johnson*, 55 Pa. St. 144.

<sup>3</sup> *Gilmore v. Wilbur*, 12 Pick. 120.

<sup>4</sup> *Collins v. Marcy*, 25 Conn. 239; *Resick v. Kern*, 4 S. & R. 267; *Houston v. Laffee*, 46 N. H. 505; *Fuhr v. Dean*, 26 Mo. 116; *Hetfield v. Cent. R. R.*, 5 Dutch. 57; *Wilson v. Chalfont*, 15 Ohio, 248; *Lacy v. Arnett*, 33 Pa. St. 159. Where the term is fixed and the licensee has made improvements not severable from the freehold, he is held to have such right and interest as tenant at will as to entitle him to notice to quit, and to be entitled to compensation for his improvements. *Fuhr v. Dean*, *supra*; *Allen v. Mansfield*, 82 Mo. 688.

<sup>5</sup> *Carter v. Harlan*, 6 Md. 20; *Cook v. Stearns*, *supra*; *Wallis v. Harrison*, 4 M. & W. 543.

<sup>6</sup> *Wilson v. Chalfont*; *Lacy v. Arnett*; *Cook v. Stearns*, *supra*; *Boone v. Stover*, 66 Mo. 430.

<sup>7</sup> *Dubois v. Kelly*, *supra*; *Carter v. Harlan*, 6 Md. 20; *Eggleston v. N. Y. & Cent. R. R.*, 35 Barb. 162. Trespass will lie against the owner of the land if he destroys the licensed structure. *Dubois v. Kelly*, *supra*.

the plaintiff's claim for damages sustained before notice of revocation has been given.<sup>1</sup>

§ 238. **Assignment of Easements. — Follow the Estate. —** Easements, like other incorporeal rights, can only be assigned by an instrument under seal; but a paper writing, or even a parol declaration, may always be made use of as evidence to show the character of an act done, or a cessation of enjoyment.<sup>2</sup> Being rights attached to the estate, and not to the person of the owner of the dominant tenement, easements follow the estate into the hands of an assignee or lessee. An easement established by prescription or inferred from user is limited to the actual user.<sup>3</sup> They are also a charge upon the servient tenement, and follow it into the hands of any person to whom such tenement, or any part thereof, is subsequently conveyed. As the right is annexed to the estate for the benefit of which the easement or servitude is created, it will not be destroyed by a division of the estate to which it is appurtenant. The assignee of any portion of the estate may claim the right so far as it is applicable to his part of the property; provided the right can be enjoyed as to separate parcels, without any additional charge or burden to the proprietor of the servient tenement.<sup>4</sup>

§ 239. **How extinguished. —** A mere change in the mode of enjoyment will not destroy an easement, unless a greater burden is thereby thrown upon the servient tenement; nor

<sup>1</sup> *Miller v. Aub. & S. R. R.*, *supra*; *Marston v. Gale*, 24 N. H. 176; *Potter v. Mercer*, 53 Cal. 667.

<sup>2</sup> Co. Lit. 264, b; Com. Dig. Release (A. I.) (B. I.). An easement in real estate, whether acquired by grant or prescription, may be extinguished or modified by a parol license, granted by the owner of the dominant tenement, and executed by the owner of the servient tenement. *Cartwright v. Maplesden*, 53 N. Y. 622. And a parol license, which if given by deed would create an easement, is revocable, although executed by the licensee. Per Metcalf, J., in *Morse v. Copeland*, 2 Gray, 302.

<sup>3</sup> *Brooks v. Curtis*, 4 Lans. 283. A right to fish, fowl, and hunt, and to go over the meadows, does not confer the right to take seaweed off the land. *Parsons v. Miller*, 15 Wend. 561.

<sup>4</sup> *Hills v. Miller*, 3 Paige, 254.

will the pulling-down of a house, for the purpose of repair, cause the loss of any easement attached to it, provided there is evidence of an intention to rebuild it within a reasonable time.<sup>1</sup> But it may be extinguished by a renunciation of the party, either express or implied, or by permitting the party from whom the servitude is due to build on the property such works as justify the presumption of an abandonment of the right.<sup>2</sup> And all easements whether of convenience or necessity are extinguished by unity of possession; but, upon any subsequent severance, easements which, previous to such unity, were easements of necessity, are granted anew, in the same manner as any other easement which would be held by law to pass as incident to the grant unless acquired by deed.<sup>3</sup> They may be lost by non-user, unless an intention of resuming the right within a reasonable time is shown to have been manifested at the time when it ceased to be used.<sup>4</sup> In a recent case, it appeared that the plaintiff, having some *ancient windows*, pulled down the wall in which they were situated, and rebuilt it on the wall of a stable, without any window. About fourteen years after this, the defendant erected a building in front of this blank wall, and, after the building

<sup>1</sup> *Hall v. Swift*, 4 Bing. (N. C.) 381. *Luttrell's Case*, 4 Co. 86; *Pope v. Devereux*, 5 Gray, 409. Where a house which by long user had become entitled to have the rain-water shed from its eaves upon the adjoining land was upon rebuilding carried a little higher than before, it was held that, in the absence of any evidence that a greater burden was thrown on the servient tenement by the alteration, the easement was not thereby destroyed, but that the premises were still entitled to the same right of eavesdrop. *Harvey v. Walters*, L. R. 8 C. P. 162.

<sup>2</sup> *Taylor v. Hampton*, 4 McCord, 96.

<sup>3</sup> *Grant v. Chase*, 17 Mass. 448.

<sup>4</sup> *Corning v. Gould*, 16 Wend. 531. The doctrine of extinction by disuse does not apply to servitudes on easements which have been created by deed. *Smiles v. Hastings*, 24 Barb. 44. In such case there must not only be a disuse by the owner of the land dominant, but an actual adverse user by the owner of the land servient. *Angell on Waterc.* 269; *Arnold v. Stevens*, 21 Pick. 106; *White v. Crawford*, 10 Mass. 189. Although the use must have been uninterrupted in order to confer title, it need not have been necessarily unintermittent; it is enough that the user is of such a nature and at such intervals as gives the owner an intimation that the right is claimed against him. *Pollard v. Barnes*, 2 Cush. 197.

had remained there about three years, the plaintiff re-opened the window in the same place that one of the ancient windows had formerly occupied, and brought his action for the obstruction to his newly-opened window by the defendant's building, but he was not permitted to recover. Mr. Justice Abbott, in delivering the judgment of the court, said, if a person entitled to ancient lights pulls down his house, and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for any considerable period of time, it lies upon him at least to show, that at the time when he erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, there was not a perpetual but a mere temporary abandonment thereof, and that he intended to resume the enjoyment of those advantages within a reasonable time. And the other justices concurred that the right to such an easement is acquired by enjoyment, continuing so long as the party either continues that enjoyment or shows an intention to continue it; and that the ceasing to enjoy it destroys the right, unless, at the time when the party discontinues the enjoyment, he does some act to show that he means to resume it within a reasonable time.<sup>1</sup> In a recent case, however, in

<sup>1</sup> *Moore v. Rawson*, 3 B. & C. 332; *Manning v. Smith*, 6 Conn. 289; *Pritchard v. Atkinson*, 4 N. H. 1. But where the right to have windows opening on a yard attached to but not part of the demised premises passed by the lease, it was held that closing a doorway which led into the yard was no abandonment of the right to have the windows unobstructed. *Doyle v. Lord*, 64 N. Y. 482. The case in the text has been adopted, rather for the sake of illustrating a principle applicable to the extinguishment of easements in general than to lights in particular. In fact, the old English doctrine on the subject of light and air, *Aldred's Case*, 9 Co. 58, is said to be an anomaly in the law, and has not been generally adopted in the United States. *Myers v. Gemmel*, 10 Barb. 537; *Keiper v. Klein*, 51 Ind. 316; *Parker v. Foote*, 19 Wend. 309; *Banks v. Am. Tr. Soc.*, 4 Sandf. Ch. 465; *Mullen v. Stricker*, 19 Ohio, 135. It cannot well be applied in the growing cities and villages of this country, without producing mischievous consequences in many cases; and, indeed, seems never to have been sanctioned in Westminster Hall until 1786, in the case of *Darwin v. Upton*, 2 Wms. Saund. 175, n., which was said to be a departure from the old law. *Bury v. Pope*, Cro. El. 118; *Hoy v. Sterret*, 2 Watts, 331. The case of *City Brew. Co. v. Tennant*, L. R. 9 Ch. 212,

the State of New York, it was held that one omission by the owner, during twenty years, to make use of water-rights, does not impair his title, or confer any right thereto upon another; and that it is not the non-user by the owner, but the adverse enjoyment by another during twenty years, which destroys his right.<sup>1</sup>

§ 240. **Extinguishment of, by Abandonment or Non-user.** — In another case, Tindal, C. J., said, suppose a person who formerly had a mill upon a stream should pull it down and remove the works, with no intention to return, could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished, or that he should be compelled to pull down his mill, if the former mill-owner should afterwards change his determination, and wish to rebuild his own? In such a case it would undoubtedly be a subject of inquiry for a jury, whether he had completely abandoned the use of the stream, or left it for a temporary purpose only.<sup>2</sup> And where an ancient window had been filled up with brick and mortar for twenty years, Lord Ellenborough

defines the modern English doctrine thus: "The right of an owner of ancient lights is to prevent his neighbor from obstructing the access of sufficient light and air, to such an extent as to render his house substantially less comfortable and enjoyable." In Illinois, the English doctrine seems to have been adopted. *Gerber v. Geabel*, 16 Ill. 217. And, in New Jersey, the Chancellor prevented by injunction the obstruction of light enjoyed for twenty-one years. *Robeson v. Pittenger*, 1 Green, Ch. 57. In South Carolina, it was in one case held to be a reasonable right, contributing to the comfort and value of a person's habitation. *McCready v. Thomson*, 1 Dudl. 131. But the law is now otherwise in that State. *Napier v. Dulwinkle*, 5 Rich. 311. So in Ohio. *Mullen v. Stricker*, 19 Ohio St. 135. And in Massachusetts, although the question was for some time left open, — see *Story v. Odin*, 12 Mass. 157; *Atkins v. Boardman*, 2 Met. 475; *Same v. Chilsom*, 7 *id.* 398; *Fifty Assoc. v. Tudor*, 6 Gray, 261, — it is now settled that no such easement can be acquired by prescription by common law. *Rogers v. Sawin*, 10 Gray, 376; *Carrig v. Dee*, 14 *id.* 583; *Richardson v. Pond*, 15 *id.* 387; *Keats v. Hugo*, 115 Mass. 209; or by statute: Pub. Sts. c. 122, § 1.

<sup>1</sup> *Townsend v. McDonald*, 12 N. Y. 381.

<sup>2</sup> *Liggins v. Inge*, 7 Bing. 693; *Martin v. Goble*, 1 Camp. 320; *Garritt v. Sharp*, 3 Ad. & E. 325.



held that the case stood as if the window had never existed.<sup>1</sup> It may be observed here, also, that the doctrine of extinguishment by disuse does not apply to easements created by deed. To become extinguished by disuse, an easement must have been acquired by use; in the latter case, mere disuse for a sufficient length of time will work an extinguishment, but if founded on a grant, then there must not only be a disuse by the owner of the dominant land, but there must be an actual adverse user by the owner of the servient land.<sup>2</sup>

§ 241. **Extinguishment of, by Operation of Law.** — The encroachment by one party upon a way held in common with another, by building part of the wall of a house upon a portion of it, and enclosing another portion within a fence, works an extinguishment of the way by operation of law, especially where the other party sells his interest after such acts done, and the purchaser on his part acquiesces in and confirms what has been done. The acts relied on to show an extinguishment must be such as clearly indicate an intention to abandon the right to the easement or servitude; and where there are no circumstances intimating the suspension to be temporary only, a *bonâ fide* purchaser will be protected in the enjoyment of the property, as it appeared at the time of the purchase. Where the case is questionable, the usual course is to leave it to the jury to say whether they will presume a grant; but where the fact of adverse possession is beyond dispute, the law itself raises the presumption.<sup>3</sup>

<sup>1</sup> *Lawrence v. Obee*, 3 Camp. 514; *Curtis v. Jackson*, 13 Mass. 507; *Blanchard v. Bridges*, 4 Ad. & E. 176.

<sup>2</sup> *Jewett v. Jewett*, 16 Barb. 150; *White v. Crawford*, 10 Mass. 183; *Arnold v. Stevens*, 24 Pick. 106; *Smyles v. Hastings*, 22 N. Y. 217.

<sup>3</sup> *Corning v. Gould*, 16 Wend. 531. Abandonment is a simple non-user of an easement; and, in order to make out an effectual answer to the claim upon that ground, I find it perfectly well settled that the enjoyment, nay, all acts of enjoyment, must have totally ceased for the same length of time that was necessary to create the original presumption. The non-user for twenty years affords a presumption, either that the former presumptive right was extinguished in favor of some other adverse right, or if none such appears, that it has been surrendered if it ever existed. A mere non-user is sufficient to produce this effect, without showing the erection, or permission to erect, a permanent obstruction. Per Cowen, J.



§ 242. **By Act of Owner of Dominant Estate.** — If the act which prevents the servitude is the act of the party having the dominant tenement, it will effect an extinguishment of the right. But if it is prevented by the act of God, or by the operation of law, it will only cause a suspension of it; for the act of a party will be construed most strongly against himself, but he shall not be injured by an act of God or the law. So it may be extinguished by an obstruction of a permanent nature, interposed by the party himself to whom the service is due, or by his consent, or by the voluntary acquisition or acceptance of any other right or privilege incompatible with the exercise of it.<sup>1</sup> A right of way is not lost by non-user for less than twenty years;<sup>2</sup> nor can a mill privilege be considered as extinguished or abandoned by disuse, until such disuse has continued entire and complete for twenty years.<sup>3</sup> But twenty-one years' occupation of land, adversely to a right of way, will bar the right.<sup>4</sup>

§ 243. **How Acquired by Prescription.** — The exclusive enjoyment of an easement for twenty years without interruption, as we have seen, raises a presumption of title in favor of the occupant, entitling him to claim by prescription. But as prescription is founded on the supposition of a grant, the use or possession on which it is based must be clearly adverse to the claim of some other person, or of a nature indicating that it is claimed as a right, and not the effect of indulgence, or of any compact short of a grant.<sup>5</sup> According to the English law, a prescription must always be laid in him that is tenant of the fee. And a tenant for life, for years, or at will, cannot *prescribe*; for as prescription, by that law, is usage beyond

<sup>1</sup> Taylor v. Hampton, 4 McCord, 96; Hall v. Swift, 6 Scott, 167.

<sup>2</sup> Emerson v. Wiley, 10 Pick. 310; Holmes v. Buckley, 1 Eq. Cas. Abr. 27.

<sup>3</sup> Hurd v. Curtis, 7 Met. 94.

<sup>4</sup> Yeakle v. Nace, 2 Whart. 123; Moore v. Browne, Dyer, 319, b. pl. 17.

<sup>5</sup> Gayetty v. Bethune, 14 Mass. 53; Lawton v. Rivers, 2 McCord, 445; Thacher v. Cobb, 5 Pick. 425; 2 Bl. Com. 265; Parker v. Foote, 19 Wend. 309. It is said, however, that as respects a public navigable river, twenty years' possession of the water at a given level is not conclusive as to this right. Vooght v. Winch, 2 B. & A. 662.

the time of memory, it is absurd that he should pretend to prescribe whose estate commenced within the remembrance of man; such tenants, therefore, must prescribe under cover of the tenant in fee-simple.<sup>1</sup> In New York, Massachusetts, and other States, an easement is acquired by twenty years' uninterrupted possession. In Connecticut and Vermont, by fifteen years' possession;<sup>2</sup> and in South Carolina it is said to be thirty years.<sup>3</sup> But it has been held not to exist at all in New Jersey<sup>4</sup> or in Pennsylvania.<sup>5</sup> And, in Virginia, twenty-seven years' possession has been held to be an insufficient ground for presuming a grant.<sup>6</sup>

<sup>1</sup> 2 Bl. Com. 265.

<sup>2</sup> *Manning v. Smith*, 6 Conn. 289; *Mitchell v. Walker*, 2 Aik. 266.

<sup>3</sup> *Lawton v. Rivers*, 2 McCord, 445.

<sup>4</sup> *Ackerman v. Shelp*, 3 Halst. 125.

<sup>5</sup> *Young v. Collins*, 2 Browne, 293.

<sup>6</sup> *Bolling v. Mayor*, 3 Rand. 563.

## CHAPTER VII.

## OF COVENANTS AND CONDITIONS.

§ 244. **Create respective Rights and Liabilities.** — A large proportion of the rights and liabilities of both landlord and tenant arises out of the *covenants* with which the parties usually define their obligations to each other. Some of these covenants are incident to the relation subsisting between them, and are obligatory independently of positive stipulation, while others are the subject of express contract and are only obligatory when inserted in the lease. Such rights may also be qualified or limited by a *condition* annexed to the estate at the time of its inception, which may either operate as a covenant, or terminate the estate according to circumstances.<sup>1</sup>

## SECTION I.

## OF COVENANTS.

§ 245. **Defined. — Created by Deed. — Tenant's Estoppel.** — A covenant is usually defined to be an agreement between two or more persons, by an instrument under seal, to do or not to do some particular thing. It can only be created by deed, but it may be by a *deed-poll*, the party being named in the deed,<sup>2</sup> as well as by *indenture*.<sup>3</sup> In general where lands are

<sup>1</sup> A breach of the covenants contained in a lease does not, in the absence of a stipulation to that effect, work a forfeiture of the term. *Vanatta v. Brewer*, 32 N. J. Eq. 26.

<sup>2</sup> *Green v. Horne*, 1 Salk. 197; *Randel v. Ches. & D. Canal Co.*, 1 Harringt. 151, 233.

<sup>3</sup> 1 Roll. Abr. 517; *Day v. Brown*, 2 Ham. 345; Co. Lit. 230, b. An instrument executed by two, to which but one seal is affixed, is the covenant of both. *Van Alstyne v. Van Slyck*, 10 Barb. 388.

conveyed by indenture to a person who does not seal the deed, but enters upon the land, and accepts the deed in other matters, he will be estopped from denying the covenants therein contained which are to be performed by him, and a court of equity will restrain him from violating them.<sup>1</sup> But with respect to the express covenants of a lease, they are only to be performed by the lessee when he has signed the instrument of demise. And where a lease which was intended to embrace special covenants on the part of the lessee was not signed by him, but was taken by the lessor and put upon record, the act was deemed to be a waiver of the lessor's right to have such covenants executed.<sup>2</sup>

§ 246. **Express or Implied.** — **Inferred from Construction of the Instrument.** — Covenants in a lease are either express or implied, or, as they are otherwise termed, covenants in deed, and covenants in law. Express covenants are such as are created by the words of the parties, declaratory of their intention. Implied covenants are those which are necessarily to be inferred from the relation of parties to each other. No precise or technical language is necessary for the purpose of making a covenant.<sup>3</sup> It may be put in the form of a condition, an exception,<sup>4</sup> or even a recital;<sup>5</sup> for wherever the intention of the parties can be collected out of the instrument, amounting to an agreement to do, or not to do, a particular thing,

<sup>1</sup> *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Trotter v. Hughes*, 12 *id.* 74; *Halsey v. Reed*, 9 Paige, 446; *Rawson v. Copland*, 2 Sandf. Ch. 251.

<sup>2</sup> *Libby v. Staples*, 39 Me. 166; *McCrea v. Purmort*, 16 Wend. 460.

<sup>3</sup> *Davis v. Lyman*, 6 Conn. 249; *Bull v. Follett*, 5 Cow. 170; *Lant v. Norris*, 1 Burr. 290, per *Ld. Mansfield*. Where words importing a covenant are intended to operate as a condition, they are always express to that point. *Surplice v. Farnsworth*, 7 M. & G. 576, 584.

<sup>4</sup> *Holder v. Taylor*, 1 Roll. Abr. 518, l. 19; *Russell v. Gulwel*, Cro. El. 657; *Lowell M. H. v. Hilton*, 11 Gray, 407.

<sup>5</sup> *Penn v. Preston*, 2 Rawle, 14; *Barfoot v. Freswell*, 3 Keb. 465. Thus a lease of a lot "with the fire-proof brick cotton-warehouse thereon" is a covenant that it is fire-proof, especially as it appears to have been the intention of the parties to secure such a warehouse. *Vaughan v. Matlock*, 23 Ark. 9. But a lease of a salt-well implies no covenant of its capacity. *Clark v. Babcock*, 23 Mich. 164.

it is sufficient to create a contract.<sup>1</sup> Thus, if it is agreed between two persons under seal that one shall pay the other a sum of money for his lands on a particular day, the words will amount to a covenant, on the part of the latter, to convey the lands on that day.<sup>2</sup> So, where an office had been conveyed by the plaintiff to the defendant, *provided*, that out of the first profits he should pay the plaintiff £500, it was held, that this proviso was in the nature of a covenant, and not being inserted by way of *condition or defeasance*, that an

<sup>1</sup> *Hallett v. Wylie*, 3 Johns. 44; *Hill v. Carr*, 1 Ca. in Ch. 294; *Randall v. Lynch*, 12 East, 182; *Chancellor v. Poole*, Doug. 766; *Johnson v. Boyfield*, 1 Ves. 314; *Livingston v. Stickles*, 8 Paige, 398. The leading rule of construction always is, that contracts are to be expounded so as to carry into effect the intention of the parties appearing on the face of the whole instrument; not from particular expressions, but *ex antecedentibus et consequentibus*, according to the reasonable sense and construction of words. *Davis v. Lyman*, 6 Conn. 249; *Watchman v. Crook*, 5 Gill & J. 239; *Quackenboss v. Lansing*, 6 Johns. 49; *Marvin v. Stone*, 2 Cow. 781; *Westcott v. Thompson*, 18 N. Y. 367; *Iggulden v. May*, 7 East, 241; *Browning v. Wright*, 2 B. & P. 13; *Doe v. Abel*, 2 M. & S. 541; *Nind v. Marshall*, 1 Br. & B. 319; *Boyle v. Peabody Heights Co.*, 46 Md. 623. The intention of both parties must be considered. *Briggs v. Vanderbilt*, 19 Barb. 222. When written, the language made use of is to govern, if it be clear and explicit, and does not involve an absurdity. *Buck v. Buck*, 18 N. Y. 339; *Moffat v. Henderson*, 50 N. Y. S. C. 211. Particular clauses are subordinate to the general intent. *Decker v. Furniss*, 14 *id.* 615. A covenant cannot be controlled by a verbal agreement; but parol evidence of fraud or mistake in a covenant is admissible: *Hustons v. Winans*, 3 Wend. 163; *Thomson v. White*, 1 Dall. 424; *Christ v. Dffenbach*, 1 S. & R. 464; *McRae v. Purmort*, 16 Wend. 460; *Depeyster v. Hasbrook*, 11 N. Y. 582; and independent collateral though contemporaneous agreements, relating to the same subject-matter, may still be supported; *Church v. Brown*, 21 N. Y. 819, 880. Ambiguous expressions are to be construed most strongly against the party using them. But if two opposite intentions are expressed, the first in order shall be preferred; or, if one of two things is to be done, the option is in the person who is to perform it. *Shep. Touch.* 166; *Rubery v. Jervoise*, 1 T. R. 229; *Dann v. Spurrier*, 3 B. & P. 399; *Hoover v. Clark*, 3 Murph. 169; *Randel v. Ches. & D. Canal Co.*, 1 Harringt. 233; *Cartwright v. Amatt*, 2 B. & P. 43; *Layton v. Pearce*, Doug. 15. Uncertain terms, too, are to be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it. *Barlow v. Scott*, 24 N. Y. 40; *Mowatt v. Londesborough*, 3 Ellis & B. 307.

<sup>2</sup> *Pordage v. Cole*, 1 Saund. 319.

action of covenant would lie upon it.<sup>1</sup> And with respect to words which are not in form either a covenant or condition, they will be construed to be either the one or the other, where, without such construction, the party would have no remedy; while the general leaning of the law against forfeitures always inclines the courts to call them a covenant rather than a condition, where the remedy can be legally attained by such a construction.<sup>2</sup>

§ 247. **Inferred from Circumstances.—Whole Instrument to be Construed together.**—In general, wherever circumstances exist from which an agreement between parties may be inferred, they are equivalent to an express promise.<sup>3</sup> As where a lease was made, on *condition* that the lessee should keep and leave the houses at the end of the term in as good plight as he found them; the lessee was held liable for omitting to leave the houses in good repair, for here an agreement to that effect was understood.<sup>4</sup> So in the case of a lease for years *rendering rent*, the word *render* was adjudged to amount to a covenant to pay rent.<sup>5</sup> But wherever the words do not amount to an

<sup>1</sup> *Clapham v. Moyle*, 1 Lev. 155. So a clause in an agreement to let land that the lessor might take any part for building, on making a proportionate abatement in the rent, and making good the fences, operates as a covenant, and not as a defeasance of the estate, if there are no words giving him a right of re-entry. *Doe v. Philips*, 2 Bing. 13; 9 Moore, 46. So a clause giving a lessor the right to sell the premises on two months' notice to the lessee, he to have the option to buy, is enabling and not restrictive of the lessor's general right to sell. *Callaghan v. Hawkes*, 121 Mass. 298.

<sup>2</sup> *Aiken v. Albany V. & C. R. R.*, 26 Barb. 289. But see *Palmer v. Fort Pl. & C. Co.*, 11 N. Y. 376. A contract will be construed a grant or a covenant, according to the intention of the parties, when it will act as either. *Culver v. Shriner*, 5 H. & I. 218.

<sup>3</sup> *Lamb v. Bunce*, 4 M. & S. 275.

<sup>4</sup> *Bac. Abr. Cov. A.*; *Roll. Abr.* 518. A lease need not contain an express covenant to build in order to make it an improvement lease. *Barclay v. Wainwright*, 86 Pa. St. 191.

<sup>5</sup> *Giles v. Hooper, Castle*, 135; *Delancey v. Ganong*, 9 N. Y. 9. So where in a lease of a coal-mine lessee agreed not to injure surface in removing coal, and this was spoken of as a condition, it was held only a covenant. *McKnight v. Kreutz*, 51 Pa. St. 232.

agreement, or are merely conditional for the purpose of defeating the estate, or relate to some collateral act or matter which is not parcel of the demise ; as, if a lease be granted, *provided and on condition* that the lessee shall collect and pay the rents of the other houses of the lessor, covenant is not maintainable, for these words are evidently intended to limit the estate.<sup>1</sup> And it is immaterial in what part of the deed a covenant is inserted ; for, in its construction, the whole deed must be taken into consideration, in order to discover the meaning of the parties ; and the meaning is to be collected from the whole context of the instrument, as well from that which precedes as from what follows the covenant, according to the reasonable sense of the words.<sup>2</sup>

§ 248. **Exception may amount to.** — Words, in the form of an exception, may amount to a covenant ; as where a lessee agreed that he would, “during the term, plough, sow, manure, and cultivate the demised premises (except the rabbit-warren and sheepwalk), in a regular and due course of husbandry, according to the custom of the country,” the exception was held to be as much of an agreement as the rest of the stipulation in which it was placed, and to import a direct obligation not to plough the rabbit-warren and sheepwalk.<sup>3</sup> So were the words that A. should take firebote, without cutting more than was necessary.<sup>4</sup> But on a covenant by a lessee, “to repair

<sup>1</sup> *Geery v. Reason*, Cro. Car. 128; *Simpson v. Titterell*, Cro. El. 242; *Ld. Cromwell's Case*, 2 Co. 71, b. Where the language imports a condition merely, and there are no words importing an agreement, it cannot be enforced as a covenant, but the only remedy is through a forfeiture of the estate. *Palmer v. Fort Pl. & C. Co.*, *supra*. Thus in a covenant not to assign without lessor's consent, the words “such consent not being arbitrarily withheld,” with a like condition contained in a lease, do not make a covenant by lessor not so to withhold, but are only a qualification of the lessee's covenant and condition. *Treloar v. Bigge*, L. R. 9 Exch. 151.

<sup>2</sup> *Knickerbacker v. Killmore*, 9 Johns. 106; *Davis v. Lyman*, 6 Conn. 249; *Ludlow v. McCrea*, 1 Wend. 228; *Plowd.* 329, cited by Lord Ellenborough in *Iggulden v. May*, 7 East, 241.

<sup>3</sup> *St. Albans v. Ellis*, 16 East, 352.

<sup>4</sup> *Stevinson's Case*, 1 Leon. 324.

the demised premises (principal timber only excepted),” the lessor was held not to be obliged to deliver the timber; for the exception amounted to no more than that he was to provide it ready for the defendant to carry away.<sup>1</sup>

§ 249. **May rest on a Recital.** — Words of recital, when joined to and considered with the rest of the intent, may be the foundation of a covenant; as, if a man recites in a deed that he is possessed of a certain interest in land, and assigns it over by the same deed, covenanting to perform all the agreements in the deed, — if he is not possessed of such an interest, there is already a breach of the covenant.<sup>2</sup> So, where one entitled to a term for ninety-nine years, “if three persons named should live so long,” recited his interest, stating that one life was in being, and then assigned his term, it was adjudged that such recital amounted to a covenant, that the life continued.<sup>3</sup> And where a lease contained a recital of an agreement with the lessor that the lessee should pull down an old mill and build another; and also contained a covenant to keep the new mill in repair, but not for building it, — it was held that the cove-

<sup>1</sup> *Brailsford v. Parsons*, 1 Lutw. 308; *Stone v. Gilliam*, 1 Show. 149. Words are to be taken in their legal sense, where they have one, unless it is apparent from the contract itself, without reference to any usage between the parties or their predecessors in antecedent contracts of the same nature, that they were meant in another sense. All contracts must be expounded with reference to their subject-matter, to which end evidence of the state of things existing when they were concluded may be given; and this rule may frequently restrain the most indefinite expressions. The custom of the place, if any such exists, is an implied term of every contract; but a usage cannot be set up in contravention of an express contract. *Master v. Howard*, 6 T. R. 338; *Pavey v. Burch*, 3 Miss. 447; *Doe v. Burt*, 1 T. R. 701; *Hassell v. Long*, 2 M. & S. 363; *Gillett v. Newman*, 1 Taunt. 137; *Yeats v. Pim*, 2 Marsh. 141. The subsequent acts of contracting parties are inadmissible to explain their original intention. And the rules for the construction of all contracts are the same, whether the instrument is by parol or under seal. *Clifton v. Walmesley*, 5 T. R. 564; *Seddon v. Senate*, 13 East, 63.

<sup>2</sup> *Severn v. Clerk*, 1 Leon. 122; *Johnson v. Proctor*, Yelv. 175; *Browning v. Wright*, 2 B. & P. 25.

<sup>3</sup> *Best v. Brett*, 1 Roll. Abr. 518; *Hollis v. Carr*, 3 Swanst. 649; *Barton v. Fitzgerald*, 15 East, 530; *Barfoot v. Freswell*, 3 Keb. 465.



nant to build was implied in the recital.<sup>1</sup> But a recital in a covenant, executed by one of the parties through misapprehension or mistake, will not be regarded by a court of equity as conclusive upon such party; for evidence will be admitted to show that the recital is not true, and that it was inserted in the covenant through misapprehension or mistake.<sup>2</sup>

§ 250. **Proviso may be Equivalent to.** — A proviso may, in some cases, amount to nothing more than a covenant; as, where a lease was made to a lessee for life, with a proviso that, if the lessee should die within the term of forty years, the executor of the lessee should have it for so many of the years as should amount to the number of forty, to be computed from the date of the lease, the proviso was held only to amount to a covenant.<sup>3</sup> Or if a lessee for years covenants to repair, "provided always, and it is agreed that the lessor shall find great timber," &c., the word "agree" creates a covenant on the part of the lessor to find great timber, and will not be considered as a qualification of the lessee's covenant.<sup>4</sup> But if the word "agreed," or some equivalent expression, is not made use of, the proviso will not operate as a covenant on the lessor's part, but only as a qualification of the covenant of the lessee; for words in an instrument under seal, which have evidently been inserted by way of condition or defeasance, will not amount to a covenant.<sup>5</sup> Nor do words expressive of the quantity of land in a deed, of themselves amount to a covenant that there is such a quantity, for they are merely descriptive of the land conveyed.<sup>6</sup>

§ 251. **License may operate as.** — A license, if under seal, may take effect as a covenant; as, where it authorizes the party to whom it is made to go upon the land of the party

<sup>1</sup> *Sampson v. Easterby*, 9 B. & C. 505.

<sup>2</sup> *Rich v. Hotchkiss*, 16 Conn. 409.

<sup>3</sup> *Parker v. Gravenor*, Dyer, 150, a; 1 Co. 155, a.

<sup>4</sup> *Holder v. Taylor*, 1 Brownl. 23; *Pordage v. Cole*, 1 Saund. 319; *Samways v. Eldsley*, 2 Mod. 73.

<sup>5</sup> *United States v. Brown*, 1 Paine, C. C. 422; *Huddle v. Worthington*, 1 Ham. 423; and see *Treloar v. Bigge*, L. R. 9 Exch. 151.

<sup>6</sup> *Powell v. Clark*, 5 Mass. 355; *Beach v. Stearns*, 1 Aik. 325.

granting it, and use the land for his own profit; and in that case it would be equivalent to a lease. Or such a license may be limited to some particular purpose, as to cut wood or draw water, and in either case would be supported as a covenant, and effect would be given to it in the same manner as any other contract.<sup>1</sup> And the same license may sometimes operate as a contract as to some things and a mere permit as to others. As in the case of a grant with permission to go upon the land of the grantor, and make a watercourse to flow over the land of the licensee. Such a license being coupled with the grant and forming part of its consideration would amount to the grant of a watercourse, and would be irrevocable, so that an action might be predicated upon any breach or interference therewith at any time.<sup>2</sup>

§ 252. *Implied, arise as Conclusions of Law.* — Implied covenants depend for their existence upon the intendment and construction of law; and are such as the law raises, from the relation of the parties to each other, or from the use of certain terms in establishing that relation, in the absence of any express agreement on the subject between them.<sup>3</sup> Thus, if land

<sup>1</sup> *Davis v. Townsend*, 10 Barb. 333. So where the license is to mine on a certain lot so long as the licensee shall do regular mining work on the lot. *Boone v. Storer*, 66 Mo. 430.

<sup>2</sup> *Wood v. Leadbitter*, 13 M. & W. 838; *Thomas v. Sorrell*, Vaugh. 380; *Cook v. Stearns*, 11 Mass. 533; *Cheever v. Pearson*, 16 Pick. 266, 273.

<sup>3</sup> *Walker v. Brown*, 28 Ill. 383. But covenants thus implied, or covenants in law, must be carefully kept distinct from covenants *implied by construction* from the words of the agreement; for these last are, properly speaking, *express*. See *Williams v. Burrell*, 1 C. B. 402, 429 *et seq.* "The distinction between covenants, and the only distinction, we take to be this: they are either covenants by express words, or covenants in law. Co. Lit. 139, b. . . . A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate. But the legal effect and operation of a covenant, whether framed in express terms, or whether the covenant be matter of inference and argument, is precisely the same; and an implied covenant, in this sense, differs nothing in its operation or legal consequences from an express covenant." Such "an implied covenant is to all intents and purposes an express covenant,

be granted for a term of years, by the words *demise* or *grant*, without any express covenant for quiet enjoyment, the lessee or his assigns, if the lessor's title proves to be defective, or he is ousted by rightful title, may sustain an action on the implied covenant that the lessor warranted he had a good title at the time of executing the deed; for the word *demise* imports a covenant for quiet enjoyment as well as a power of letting. So the word *grant* implies the power of giving;<sup>1</sup> although it does not constitute a warranty when used in a conveyance of freehold estate.<sup>2</sup> And in an agreement to assign a lease an undertaking is implied to warrant the lessor's title and the lessee's right to assign.<sup>3</sup> A covenant is also implied on the

and it is only those covenants which the law itself implies that can properly be considered as covenants in law." The words "yielding and rendering" are accordingly not properly an implied covenant, but an express one, by construction. They are, it is true, often termed an implied covenant, but this can only mean by construction, and that is tantamount to an express covenant; and they should have all the incidents of the latter. See *Hellier v. Gaspard*, 1 Sid. 266; *Newton v. Osborn*, Style, 387; *Bingh. Real Prop.* 388, 389; and see *Bowen v. Hodges*, 13 C. B. 765, 774. In only one case was the point decided otherwise; viz., *Kimp-ton v. Walker*, 9 Vt. 191; though in many text-writers and cases *dicta* are found to that effect. But in that case (p. 200) it is admitted that "*the words express the thing to be done, and, in that sense, are express,*" which concedes the whole point; for a covenant is express whenever the natural import of the terms, singly, or with the aid of construction or inference, expresses the obligation.

<sup>1</sup> *Grannis v. Clark*, 8 Cow. 36; *Frost v. Raymund*, 2 Caines, 188; *Deering v. Farrington*, Freem. 368; *Hackett v. Glover*, 10 Mod. 142; *Spencer's Case*, 5 Co. 17; *Barney v. Keith*, 4 Wend. 502; *Wells v. Mason*, 4 Scam. 84; *Folts v. Huntley*, 7 Wend. 210; *Adams v. Gibney*, 6 Bing. 656; *Stott v. Rutherford*, 92 U. S. 107. A recited antecedent agreement may raise a covenant by implication. *Easterby v. Sampson*, 6 Bing. 644. So the word "*let*," or any equivalent word, imports a covenant of quiet enjoyment. *Hall v. City Brew. Co.*, 12 B. & S. 737; *Maule v. Ashmead*, 20 Pa. St. 482; *Ross v. Dysart*, 33 *id.* 452; *Hamilton v. Wright*, 28 Mo. 199; *Montagu v. W. & Mos. C. & I. Co.*, 1 L. R. C. P. Div. 145; *Stott v. Rutherford*, *supra*. But *Lovering v. Lovering*, 13 N. H. 513, is *contra*.

<sup>2</sup> *Spencer's Case*, 5 Co. 18, a; *Browning v. Honeywood*, Freem. 339-414. But these words import no covenant in an assignment. *Landydale v. Cheyney*, Cro. El. 157; *Blair v. Rankin*, 11 Mo. 442.

<sup>3</sup> *Souter v. Drake*, 5 B. & Ad. 992; *Bensel v. Gray*, 38 N. Y. Sup'r, 447; *Same v. Same*, 44 *id.* 253.

part of the lessee, that he will use the land demised to him in a husband-like manner, and not unnecessarily exhaust the soil by negligent or improper tillage.<sup>1</sup> And, as a consideration is necessary to every contract, it is always implied that the tenant shall pay an annual rent, unless the lease was granted in consideration of a sum in gross. So a covenant by a lessee to pen and fold the flock of sheep, which he should keep upon the premises, upon those parts of the land where they had usually been folded, was held to imply a covenant to keep a flock of sheep upon the premises.<sup>2</sup>

§ 253. **Implied, cannot Control but may Enlarge or Qualify Express Covenants.** — It is also a well-settled rule that where there is an express covenant the law will not imply one. But an implied covenant may be qualified, enlarged, or restrained by an express covenant;<sup>3</sup> as, for example, the implied covenant for quiet enjoyment against all persons claiming title, may be enlarged by the lessor's covenanting against disturbances by all persons whatsoever; or narrowed by his covenanting against the acts of such persons only as claim through him. An implied covenant may however subsist in the deed, if it is consistent with, and not contradictory to, the express covenant:<sup>4</sup> thus, a stipulation in the lease regulating the disposition of the hay, straw, and manure, does not exclude an agreement implied from custom that the tenant shall be paid for his seeds and labor.<sup>5</sup> And an express covenant will be limited to its proper force, and not imply an obligation

<sup>1</sup> *Powley v. Walker*, 5 T. R. 373; *Walker v. Tucker*, 70 Ill. 527.

<sup>2</sup> *Webb v. Plummer*, 2 B. & A. 746.

<sup>3</sup> *Kent v. Welch*, 7 Johns. 258; *Sumner v. Williams*, 8 Mass. 201.

<sup>4</sup> *Gates v. Caldwell*, 7 Mass. 68; *Christine v. Whitehill*, 16 S. & R. 98; *Morris v. Harris*, 9 Gill. 19.

<sup>5</sup> *Hutton v. Warren*, 1 M. & W. 466; and the broad language of Bayley, J., in *Webb v. Plummer*, 2 B. & A. 750, "where the lease specifies any of the terms of quitting, we must then go by the lease alone," is here qualified. In *Holford v. Dunnett*, 7 M. & W. 348, it seems held that the obligation of the lessee to use the premises in a tenant-like manner will be implied, though there is an express covenant to repair; but *Standen v. Christmas*, 10 Q. B. 135, is a direct authority to the contrary.

which is not strictly *in pari materia*. Thus a covenant of warranty does not imply a covenant of seisin, nor under such a covenant can it be assigned as a breach that there was no such land as the grantor undertook to dispose of.<sup>1</sup> So a covenant of quiet enjoyment in a lease by a vendee was no warranty against a restriction on the use of the premises contained in the deed to the former.<sup>2</sup>

§ 254. *Of mesne Lessors and their Lessees.* — Where a lessee assigns the leasehold premises, “to have and to hold in as ample a manner, to all intents and purposes, as the assignor might or could hold the same, and covenants that he had good and lawful right to bargain and transfer the premises, as above written, and that the same are free of all arrearages of rent, and other incumbrances,” the covenant is limited to the acts of the assignor himself, and does not amount to a warranty of the landlord’s title.<sup>3</sup> And if, in an under-lease, the sub-lessee covenants to keep down the rent reserved in the original lease, and the superior landlord distrains, at the end of the first quarter of the under-lease, for one quarter’s rent due under the superior lease, there will be no implied covenant on the part of the sub-lessor to indemnify his lessee, although the rent in the under lease is reserved yearly.<sup>4</sup> So an express covenant against persons who are named restricts any implied covenant arising under the word “demise.”<sup>5</sup> And an express covenant for quiet enjoyment restrains the implication usually contained in the word “demise,” which usually implies two covenants, to wit, a covenant for title, and another for quiet enjoyment.<sup>6</sup>

<sup>1</sup> *Cutter v. Powell*, 6 T. R. 320; *Vanderkarr v. Vanderkarr*, 11 Johns. 122.

<sup>2</sup> *Dennett v. Atherton*, L. R. 7 Q. B. 316.

<sup>3</sup> *Knickerbacker v. Killmore*, 9 Johns. 106.

<sup>4</sup> *Upton v. Fergusson*, 3 Moore & S. 88.

<sup>5</sup> *Merrill v. Frame*, 4 Taunt. 329.

<sup>6</sup> *Line v. Stephenson*, 4 Bing. (N. C.) 678; s. c. 5 Bing. (N. C.) 183. A mere parol demise imports only a contract for quiet enjoyment, not for title. *Granger v. Collins*, 6 M. & W. 458; *Bandy v. Cartwright*, 8 Exch. 913; *Vernam v. Smith*, 15 N. Y. 327, 332; *Maule v. Ashmead*, 20 Pa. St. 482; *Carson v. Godley*, 26 *id.* 117; *Ross v. Dysart*, 33 *id.* 452.

§ 255. **How Limited by Construction.** — In order to support the apparent intention of the parties, covenants in large and general terms have been frequently narrowed and confined;<sup>1</sup> as, where the defendant sold the plaintiff a lease for years, and covenanted that *he would not do nor have done* any act to disturb the plaintiff, but that the plaintiff should hold and enjoy without the disturbance of the vendor *or any other person*, it was held that the covenant was confined to acts done or to be done by the vendor, and that the words *or any other person* were to be referred to, and regulated by the former part of the engagement.<sup>2</sup> So a covenant that the grantors were seised of a good estate in fee, and had good right to convey, was held to be qualified and restrained by a subsequent covenant for quiet enjoyment, without let or interruption by them, their heirs, or other persons claiming under them.<sup>3</sup>

§ 256. **Express and Implied, Distinctions between.** — The distinction between express and implied covenants is important, and not merely technical. Express covenants will be construed more strictly than those which are implied, and may be entered into without a consideration, while the latter cannot.<sup>4</sup> Implied covenants cannot extend to a thing not *in esse* at the time of the demise; therefore if A., in consideration that B. will build a mill upon the land, and make a watercourse through it, grants and demises the land to B. for a term of years, and afterwards stops the watercourse, B. cannot maintain covenant against him.<sup>5</sup> Such covenants are also confined to the party covenanting, and do not bind his representatives; and though the word *demise* in a lease, where there is no express covenant for title, amounts to an implied

<sup>1</sup> *Cole v. Hawes*, 2 Johns. Cas. 203; *Miller v. Heller*, 7 S. & R. 40.

<sup>2</sup> *Broughton v. Conway*, Moor, 58; *Gale v. Reed*, 8 East, 89; *Nind v. Marshall*, 1 Br. & B. 319.

<sup>3</sup> *Milner v. Horton*, McClel. 647; *Doe v. Meux*, 4 B. & C. 606.

<sup>4</sup> *Shubrick v. Salmond*, 3 Burr. 1639; *May v. Trye*, 1 Freem. 447. The seal of a covenant, however, always imports a consideration. Express covenants contained in a lease will not be extended by implication, unless the implication is clear and undoubted. *Smiley v. McLauthlin*, 138 Mass. 363.

<sup>5</sup> *Huddy v. Fisher*, 1 Leon. 278.

covenant to that effect, yet if the lessor be tenant for life only, and the remainder-man should oust the lessee, he will have no remedy, on the merely implied covenant, against the executors of the lessor.<sup>1</sup>

§ 257. **Implied, Statute as to, construed in New York.** — The common-law doctrine of implied covenants in leases for years was at one time considered to have been abrogated in New York by a provision of the Revised Statutes, which declares that “no covenant shall be implied in any conveyance of real estate whether such conveyance contain special provisions or not;” the words “real estate” being construed to include leases for years.<sup>2</sup> But this construction of the statute was subsequently denied,<sup>3</sup> and the Court of Appeals in that State now holds that there is nothing in the statute which is intended to apply to terms for years, and that a covenant for quiet enjoyment is necessarily implied in every lease for years.<sup>4</sup>

§ 258. **Parties.** — **Who may maintain Actions on Covenants.** — With respect to the parties to a covenant, it is a general rule that where a contract is made for the benefit of a third person it is valid, and may be enforced by him, if he has an interest in the subject-matter of the contract;<sup>5</sup> but where it is made under seal, and *inter partes*, no one but a party to the instrument can maintain an action for a breach of it.<sup>6</sup> An indenture not *inter partes* will have the operation of a deed-poll, on

<sup>1</sup> *McClowry v. Croghan*, 1 Grant's Ca. 211; *Adams v. Gibney*, 6 Bing. 656.

<sup>2</sup> *Baxter v. Ryerss*, 13 Barb. 284; *Kinney v. Watts*, 14 Wend. 38.

<sup>3</sup> *Tone v. Brace*, 8 Paige, 597; 11 *id.* 569.

<sup>4</sup> *Mayor v. Mabie*, 13 N. Y. 151; *Vernam v. Smith*, 15 *id.* 327; *Burr v. Stenton*, 42 *id.* 462; and see *post*, § 304.

<sup>5</sup> *Brewer v. Dyer*, 7 Cush. 337, where lessor maintained assumpsit on an agreement given to the lessee for the rent by one who had received occupation from him. So see *Lawrence v. Fox*, 20 N. Y. 268; *Van Schaick v. Third Av. R. R.*, 38 *id.* 346; when the obligation is not under seal. But that a mere beneficiary cannot sue, see *Mellen v. Whipple*, 1 Gray, 317; and *Brewer v. Dyer* has since been denied to be law. See *ante*, § 155, and n.

<sup>6</sup> *Spencer v. Field*, 10 Wend. 87; *Stone v. Wood*, 7 Cow. 458.



which an action may be maintained by a party not executing it, but to and with whom the covenant is made;<sup>1</sup> as where A. covenanted with B. to pay him a certain sum of money, and in the same instrument also covenanted with B. & C. to pay C. another sum of money, the court were of opinion that as this was not an indenture between parties, but only a deed-poll, the party might covenant with a stranger, and also with other persons, to do several other acts for which every one severally might bring his action.<sup>2</sup> But a party for whose benefit merely a covenant is made, cannot maintain an action thereon; nor by a deed *inter partes* can one who is a party to the deed covenant with another who is no party to it; even for the performance of acts expressly for such third person's benefit.<sup>3</sup> Yet if one who is a mere stranger, and not named a party (the instrument being *inter partes*), covenants with another who is named, and seals the deed, he is bound by his seal. As, where one agreed to let a house to another at a certain rent, and a stranger covenanted on behalf of the lessee that the lessee should pay the rent, it was held that on this deed the defendant, although not a party, was liable to an action of covenant, in consequence of his having sealed.<sup>4</sup>

§ 259. **Grantee in Deed-poll not liable in Covenant.**—No action of covenant can be maintained under a deed-poll against a lessee claiming title to the estate, nor can mutual covenants arise under such an instrument, as it is the deed of one party only.<sup>5</sup> It would, therefore, be unsafe to dispense with the

<sup>1</sup> *Matthewson's Case*, 5 Co. 22.

<sup>2</sup> *Lowther v. Kelly*, 8 Mod. 115; *Lucke v. Lucke*, 1 Lutw. 302; *Cooker v. Child*, 2 Lev. 74; *Van Alstyne v. Van Slyck*, 10 Barb. 383.

<sup>3</sup> *Haskett v. Flint*, 5 Blackf. 69; *Bleecker v. Bingham*, 3 Paige, 246.

<sup>4</sup> *Storer v. Gordon*, 3 M. & S. 322; *Metcalf v. Rycroft*, 6 *id.* 75; *Wheelright v. Beers*, 2 Halst. 391; *Berkeley v. Hardy*, 5 B. & C. 355; *Southampton v. Brown*, 6 *id.* 718.

<sup>5</sup> *Chancellor v. Poole*, 2 Doug. 764; *Staines v. Morris*, 1 Ves. & B. 14; *Wilkins v. Fry*, 1 Mer. 266; *Sutherland v. Lishnan*, 3 Esp. 42; *Kimpton v. Eve*, 2 Ves. & B. 358; *Burnett v. Lynch*, 5 B. & C. 589. So *Trustees v. Spencer*, 7 Ohio, 493, where a lessee under a sealed lease, who had entered but not sealed, was held not liable to lessor in covenant. But in *Aiken v. Alb. R. R.*, 26 Barb. 289, the grantee in a deed-poll who had entered was held bound by acts covenanted to be done by him, though the



execution of an indenture by the lessee, on the assumption that his entry and enjoyment under the lease would be sufficient to expose him to an action for a breach of any of the covenants to be performed by him. But a covenantee, without executing the deed, may bring an action of covenant against the covenantor, whether the instrument be by deed-poll or indenture; for the execution by a covenantor fixes his liability.<sup>1</sup>

§ 260. **Personal, or running with the Land.** — Covenants in a lease are either personal, or run with the land. If they extend to a thing *in esse*, parcel of the demise, and touch or concern the estate, as to rebuild or repair, they *run with the land* and every part thereof, and bind not only the covenantor and his personal representatives by privity of contract, but also the assignee, though not named, and every other person who is in of any estate created by, or growing out of the original demise, by privity of estate.<sup>2</sup> And if they relate to a thing not *in esse*, but which is yet to be done upon the land

words were the grantor's; and, in *Finley v. Simpson*, 2 Zab. 311, and *McLaughlin v. McGovern*, 34 Barb. 208, the same doctrine was laid down, with regard to a lessee by indenture who had entered, but neither signed nor sealed the lease; and to the same point are *Co. Lit.* 231, a; *Lock v. Wright*, 8 Mod. 40. But the opposite doctrine was laid down in *Platt, Cov.* 10-12; and was held in *Maule v. Weaver*, 7 Pa. St. 329; *Irish v. Johnston*, 11 *id.* 488.

<sup>1</sup> *Smith et al. v. Kerr*, 3 N. Y. 144; *Petrie v. Bury*, 3 B. & C. 353; *Vernon v. Jefferys*, 2 Stra. 1146; *Codman v. Hall*, 9 Allen, 335. Such an action lies also in favor of the assignee of the lessee. *Aveline v. Whisson*, 4 M. & G. 80. And if a lease by indenture has been accepted and occupancy had thereunder, its covenants bind the lessee, though the statute requirement that it should be witnessed, acknowledged, and recorded, to be effectual against any one but the grantor, has not been complied with. *Ripley v. Cross*, 111 Mass. 41.

<sup>2</sup> *Spencer's Case*, 5 Co. 16, 1st resolution. On a covenant by a lessee, not naming assigns, to repair and yield up in repair, all buildings and erections, an assignee is liable in respect of the non-repair of buildings erected during the term; for this is not a future obligation, but a present one to do something conditionally. *Minshull v. Oakes*, 2 H. & N. 793; *Martyn v. Clue*, 18 Q. B. 661. But the assignee of the reversion is not so bound: *Id.*; *Hansen v. Meyer*, 81 Ill. 321; though in the latter case the decision is based on the 2d resolution in *Spencer's Case*.

tending to enhance its value, or to render its enjoyment more beneficial to the owner or occupant, as to build a house or a wall, the assignees, if named, are also bound.<sup>1</sup> But if they do not touch or concern the thing demised, as to build a house *de novo*; or to build on other land; or to pay a collateral sum to the lessor, — the assignee, though named, is not bound; such covenants being considered mere *personal covenants* not affecting the land demised, but merely collateral to it.<sup>2</sup>

§ 261. **Running with the Land, what. — Concern the Land. — Privity of Estate essential to Create.** — In order that a covenant may run with the land, its performance or non-performance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or must affect its mode of enjoyment.<sup>3</sup> *It must not only concern the land,*

<sup>1</sup> *Spencer's Case*, *supra*, 2d resolution. *Hansen v. Meyer*, *supra*. So a covenant to insure a building covenanted to be erected by the lessor as parcel of the demise runs, though the word "assigns" is not added. *Masury v. Southworth*, 9 Ohio St. 340. Whether a covenant to deliver up would so run was doubted in *Sargent v. Smith*, 12 Gray, 426, and denied by Parke, B., in *Doe v. Seaton*, 2 C. M. & R. 730. *Verplank v. Wright*, 23 Wend. 506; *Wakefield v. Brown*, 9 Q. B. 209.

<sup>2</sup> *Spencer's Case*, *supra*, 2d resolution; *Dolph v. White*, 12 N. Y. 296; *Mayor, &c. v. Pattison*, 10 East, 130; *Curtis v. White*, Clarke, 389. Where a lessee had covenanted for himself and his heirs to pay rent during the term, and after his death his son entered into possession and paid rent for several months, it was held that the son was not liable on the covenant, since this did not run with the blood, and could not be inherited. *Camp v. Scott*, 47 Conn. 366. The rules laid down in the text are only stated as applicable to the lessee's covenants. But they apply equally to those of a lessor which will run with the land demised, and enure to the lessee's assigns under similar conditions. At common law the assignees of a reversion were neither bound by nor could take advantage of the covenants or conditions in the lease, although these were of a nature to run with the land. This was altered by Stat. Hen. VIII. c. 34, as to assignees of reversions on leases for life or years.

<sup>3</sup> *Norman v. Wells*, 17 Wend. 136; see *post*, § 444; *Dunn v. Barton*, 16 Fla. 765; *Scheidt v. Belz*, 4 Bradw. (Ill.) 431. Thus a mortgage, contained in a lease, of the crops to be raised on the premises, as a security for the rent, constitutes a covenant running with the land. *Doty v. Heth*, 52 Miss. 530. So where the covenant is that the rent shall be a lien on

*but there must also be a privity of estate* between the contracting parties;<sup>1</sup> for if a party covenant with a stranger to pay a the buildings and improvements. *Webster v. Nichols*, 104 Ill. 160. So a covenant in a lease with the privilege to make lime on the premises, that the lessee will "remove all rubbish and spalls" at the expiration of his term is held to run with the land. *Coppinger v. Armstrong*, 5 Bradw. (Ill.) 637. Much learning has been expended, and sometimes to little purpose, in endeavoring to define the boundary between real covenants, or such as run with the land, and those which are merely personal. A most elaborate effort to accomplish this end was made by Mr. Justice Cowen, in *Norman v. Wells*; and yet, after all his researches, that indefatigable judge was forced to declare that the authorities still left the application of old principles to new cases a very nice exercise of the mind, and remaining a matter for judicial discretion, in greater degree, than almost any other of equal importance in the law of property. Per Harris, J., in *Van Rensselaer v. Bonesteel*, 24 Barb. 367.

<sup>1</sup> The rule fully stated is, that in order to the *burden* of the covenant running with the land and binding the assigns of the covenantor there must have been a privity of estate between the contracting parties at the time of the contract; but the *benefit* of a covenant touching the land will run with the land though the covenantor is a stranger. The latter was settled as long ago as 42 Ed. III. 3; the case of the Prior and Convent, stated and followed in *Spencer's Case*, 5 Co. 16, is well-established law, and is the ground of recovery on covenants of title by assignees of a grantee in fee. The former has been much debated, but is, on the whole, settled as stated, *supra*. So per Willes, J., in *Dennett v. Atherton*, L. R. 7 Q. B. 316, 326. Thus, where the covenanting parties never had any interest in the land, their assignees are not bound. *Hurd v. Curtis*, 19 Pick. 459; *Keppell v. Bailey*, 2 Mylne & K. 517; *Plymouth v. Carver*, 16 Pick. 183; *Bronson v. Coffin*, 108 Mass. 180. So a covenant by lessor with lessee not to exercise a particular trade on another parcel of lessor's land does not bind a grantee of the latter parcel, for *quoad hoc* they are strangers. *Taylor v. Owen*, 2 Blackf. 301. In equity, however, it seems well settled that the want of privity will not relieve an assignee from the burden of a covenant relating to the premises of which he has full notice before the assignment; and *Keppell v. Bailey*, *supra*, is to this extent overruled. *Luker v. Dennis*, 7 L. R. Ch. Div. 227. So, since the statute of *quia emptores*, which abrogated privity of estate and tenure between grantor and grantee on a conveyance in fee, covenants thereon will not run with the land to bind assigns; as, for instance, to pay rent, it being a rent charge. *Brewster v. Kidgill*, 12 Mod. 166, explained in 1 Smith Lead. Cas. 32; *Coke v. Arundel*, Hardr. 87. But where this statute is not in force, as in Pennsylvania, privity exists between lessor and lessee in fee; the rent reserved is a rent service, and a covenant to pay it binds the assigns of a lessee in the land. *Dunbar v. Jumper*, 2 Yeates, 74; *Jugersoll v. Sargent*, 1 Whart. 348; *Royer v. Ake*, 3 Pa. 461; *Herbaugh*

certain rent, in consideration of a benefit to be derived under a third person, it cannot run with the land, not being made with the person having the legal estate.<sup>1</sup> And if the assignee of the reversion or term come in of a different estate to that held by the lessor or lessee, he cannot sue or be sued on the covenants running with the land, for want of privity.<sup>2</sup> Thus,

*v. Zentmyer*, 2 Rawle, 159; *Hannen v. Ewalt*, 18 Pa. St. 9. So *Wallace v. Harmstad*, 44 Pa. St. 492; although it is denied that this flowed from fealty or any feudal relation. In New York, the law was so held: *Van Rensselaer v. Bradley*, 3 Den. 135; until 1852, when the case of *Depeyster v. Michael*, 6 N. Y. 467, held that, by statutes of 1779 and 1787, the statute of *quia emptores* had been re-enacted, and no tenure of privity existed on a lease in fee. This, denying privity, seemed to conclude any liability of the assignee of the lessee in fee on the latter's covenants touching the land. But in *Van Rensselaer v. Hays*, 19 N. Y. 68, the law was held otherwise by force of statute 1805, c. 98; and though the rent was a rent charge and not a rent service, the assignee was bound to its payment. The statute of 1805 was repealed in 1860, c. 396; but the same doctrine was decided to exist at common law; *Van Rensselaer v. Read*, 26 N. Y. 558; while in *Same v. Slingerland*, *id.* 580, the statute of 1846, c. 274, was held to give the same rights in ejectment; and these in *Same v. Denison*, 35 *id.* 93, were held to exist by common law on conditions in deed, and that the statute of 1787 only affected conditions in law; and these doctrines were adopted in *Tyler v. Heidorn*, 46 Barb. 439, after a full review of the cases, the ground taken being that the reservation of a rent in fee, like its grant, created an incorporeal hereditament, producing privity and a right and liability on the covenants annexed. And in *Van Rensselaer v. Barringer*, 39 N. Y. 9, *Hosford v. Ballard*, *id.* 147, *Lyons v. Adde*, 63 Barb. 89, the law was declared settled beyond discussion.

<sup>1</sup> *Demarest v. Willard*, 8 Cow. 206; *Wooliscroft v. Norton*, 15 Wis. 198; *Webb v. Russell*, 3 T. R. 393; *Allen v. Wooley*, 1 Blackf. 148. But see *Willard v. Tillman*, 2 Hill, 274.

<sup>2</sup> Co. Lit. 215; 1 Saund. 240, a. Though there should be a total want of right in the original covenantor, if his deed transfers the possession, and that possession passes by subsequent conveyances, the original covenants pass therewith. The naked possession is an estate, and covenants real before breach pass with it. *Beddoe v. Wadsworth*, 21 Wend. 120. Thus, the covenant made by the donee of a power of appointment will not bind his appointees, as they do not succeed to his estate, but to the donor's. *Roach v. Wadham*, 6 East, 289. So, where covenants are not annexed to the reversion to which plaintiff succeeds. *Cardwell v. Lucas*, 2 M. & W. 111; *Cooch v. Goodman*, 2 Q. B. 580. On this principle a privilege granted by an owner to an abutting owner, for the benefit of the latter's estate, is personal, and does not pass to a lessee of the latter. *People v. C. & N. W. R. R.*, 57 Ill. 436.

if a party, having only an equitable estate in a freehold, grants a lease, and then devises the estate to A., and after the death of the testator, A. acquires the legal estate from the person in whom it was vested at the time of the lease and devise, and then sells and conveys the legal estate to B., the latter cannot sue the lessee or his assignee, because he is not in of the same estate as the lessor.<sup>1</sup> There is no difference, however, between express and implied covenants, with respect to their running with the land;<sup>2</sup> but mere equitable covenants do not run with the land.<sup>3</sup> It is perhaps hardly necessary to add that the doc-

<sup>1</sup> *Whitton v. Peacock*, 2 Bing. (N. C.) 411.

<sup>2</sup> *Vyvyan v. Arthur*, 1 B. & C. 410.

<sup>3</sup> *Whitton v. Peacock*, *supra*. Covenants are ordinarily spoken of as running with the *land*. How far they run with incorporeal interests in land the cases are not agreed. In England, the benefit of a covenant to pay rent will not run with the rent alone. *Milnes v. Branch*, 5 M. & S. 411; per Parke, B., *Randall v. Rigby*, 4 M. & W. 135; and yet a covenant to pay tithes ran with the tithes. *Bally v. Wells*, 3 Wils. 25; and see *Egremont v. Keene*, 2 Jones, Exch. 307; *Muskett v. Hill*, 5 Bing. (N. C.) 694; *Williams v. Hayward*, 1 Ellis & E. 1040. In this country, it has been thought that a covenant to pay rent on a lease for life or years will run with the rent alone. See *Willard v. Tillman*, 2 Hill, 274; *Demarest v. Willard*, 8 Cow. 206; *Patten v. Deshon*, 1 Gray, 325. And the same was held of rent on a lease in fee in Pennsylvania. *Streaper v. Fisher*, 1 Rawle, 155; *St. Mary's Church v. Miles*, 1 Whart. 229; *Scott v. Lunt*, 7 Pet. 596. But the sounder view is otherwise both with regard to the former: *Allen v. Wooley*, 1 Blackf. 148; per Bronson, C. J., in *Willard v. Tillman*, 2 Hill, 276; and the latter class of rents: *Devisees Van Rensselaer v. Platner*, 2 Johns. Cas. 24; *Irish v. Johnston*, 11 Pa. St. 488. And it has been recently held that such a rent is not a vested estate, but rests in contract only, and is liable to be defeated by an alteration therein. *Wallace v. Harmstad*, *supra*. In New York, however, by the statute of 1805, assignees of a rent-charge were held entitled to maintain covenant therefor. *Van Rensselaer v. Hays*, 19 N. Y. 68. And since the repeal of this statute, in 1860, the same right has been held to exist at common law. *Van Rensselaer v. Read*, 26 *id.* 558; *Tyler v. Heidorn*, 46 Barb. 439. Covenants, it seems well settled, will run with a transfer of the possession of land without title on the ground of estoppel, if the want of title does not appear by the pleadings. *Beddoe's Ex'or v. Wadsworth*, 21 Wend. 120; *Slater v. Rawson*, 6 Met. 439; *Fowler v. Poling*, 2 Barb. 300; *Barker v. McCoy*, 3 Ohio, 211; *Foote v. Burnet*, 10 *id.* 317; *Devore v. Sunderland*, 17 *id.* 52; *Dickinson v. Hoomes*, 8 Gratt. 353; *Webb v. Austin*, 8 Scott, N. R. 419; *Gouldsworth v. Knights*, 11 M. & W. 337. But if the want

trine of covenants running with the land is limited to instruments under seal.<sup>1</sup>

§ 262. **Specific Covenants running with the Land.** — All covenants which are implied in law run with the land. So, also, do covenants for quiet enjoyment;<sup>2</sup> to insure, if the insurance is to be laid out in rebuilding;<sup>3</sup> for further assurance;<sup>4</sup> to repair;<sup>5</sup> to insure, if the proceeds are to be applied in the restoration of the buildings in case of loss;<sup>6</sup> to abstain from carrying on any offensive trade upon the premises;<sup>7</sup> to discharge the lessor from taxes and assessments, ordinary or extraordinary;<sup>8</sup> to permit the lessor to have free passage to two rooms excepted in the demise;<sup>9</sup> to cultivate the land in a particular manner;<sup>10</sup> or to cultivate with laborers from a particular locality;<sup>11</sup> to maintain a partition fence;<sup>12</sup> not to carry on particular

of title appears, the action will fail. *Noke v. Awder*, Cro. El. 373, 436; *Andrews v. Pearce*, 4 B. & P. 158; *Pargeter v. Harris*, 7 Q. B. 708; *Carvick v. Blagrove*, 1 Br. & B. 531.

<sup>1</sup> *Elliott v. Johnson*, 8 B. & S. 38, per Lush, J.

<sup>2</sup> *Suydam v. Jones*, 10 Wend. 180; *Hunt v. Amidon*, 4 Hill, 345; *Noke v. Awder*, Cro. El. 436; *Campbell v. Lewis*, 3 B. & A. 392.

<sup>3</sup> *Vernon v. Smith*, 5 B. & A. 1; *Thomas v. Van Kapff*, 6 Gill & J. 372.

<sup>4</sup> *Middlemore v. Goodale*, Cro. Car. 503; *Roe v. Hayley*, 12 East, 464; *Bennett v. Waller*, 23 Ill. 97.

<sup>5</sup> *Demarest v. Willard*, 8 Cow. 206; *Dean and Chapter of Windsor's Case*, 5 Co. 24; *Shelby v. Hearne*, 6 Yerg. 512; *Kingdom v. Nottle*, 1 M. & S. 355. So *Myers v. Burns*, 33 Barb. 401; *Payne v. Haine*, 16 M. & W. 541. So even a covenant to pull down and put up. *Harris v. Goslin*, 3 Harringt. 340. So, on a demise of a cottage for hunting, a covenant to leave the land well stocked runs. *Hooper v. Clark*, 8 B. & S. 150.

<sup>6</sup> *Thomas v. Van Kapff*, 6 Gill & J. 372.

<sup>7</sup> *Barron v. Richards*, 3 Edw. 96.

<sup>8</sup> *Post v. Kearney*, 2 N. Y. 394; *Martin v. Baker*, 5 Blackf. 232.

<sup>9</sup> *Cole's Case*, 1 Salk. 196; *Bush v. Calis*, 1 Show. 389.

<sup>10</sup> *Cockson v. Cock*, Cro. Jac. 125. The lessor's covenant that the lessee shall have the right to occupy, during his term, such portion of lands as he shall clear and reduce to cultivation, runs with the land and binds the assignee of the reversion. *Callan v. McDaniel*, 72 Ala. 96; *McDaniel v. Callan*, 75 *id.* 327.

<sup>11</sup> *Mayor of Congleton v. Pattison*, 10 East, 130.

<sup>12</sup> *Kellogg v. Robinson*, 6 Vt. 276.

*choses in action*, they are not assignable.<sup>1</sup> So a covenant on the part of the lessor to pay the lessee, without including his assigns, for a building not yet erected, but which is to be built during the term, does not run with the land.<sup>2</sup> Nor are the lessor's covenants to pay the debt of a third person, to surrender certain personal chattels, or to pay the lessee for chattels replaced by him during the term, binding upon an assignee.<sup>3</sup>

§ 264. **Joint or Several. — Joint and Several.** — Covenants may also be either joint or several, and are sometimes both joint and several. But whether a covenant is joint or several depends upon the subject-matter of the covenant, and the interest that passes by it, and not upon the precise language made use of in the instrument of demise. The interest which the covenantees have in the performance of the covenant, will generally determine the question whether the right of action given by it is joint or several.<sup>4</sup> If the interest is joint, the action must be in the name of all the covenantees, although the words of the covenant are several. But if the interest of the covenantees is several, the covenant will be several, although the terms of it be joint.<sup>5</sup> If two lessees covenant

<sup>1</sup> 4 Kent, Com. 459; *Greenby v. Wilcocks*, 2 Johns. 1; *Birney v. Hann*, 3 A. K. Marsh. 322; *Chapman v. Holmes*, 5 Halst. 20; *Bingham v. Weiderwax*, 1 N. Y. 509; *Mitchell v. Hazen*, 4 Conn. 459; *Innes v. Agnew*, 1 Ohio, 386; *Bickford v. Page*, 2 Mass. 455. For the same reason, covenants that are broken before an assignment do not pass as incident to the land. *Shelby v. Hearne*, 6 Yerg. 512. But the law is otherwise in England and in the States of Indiana, Ohio, and Missouri, where these covenants are held to be continuing and running with the land. *Kingdon v. Nottle*, 4 M. & S. 53; *Martin v. Baker*, 5 Blackf. 232; *Devore v. Sunderland*, 17 Ohio, 52; *Dickson v. Desire*, 23 Mo. 151; and in Maine, by statute; Rev. Stat. c. 115, § 16.

<sup>2</sup> *Thompson v. Rose*, 8 Cow. 266.

<sup>3</sup> *Dolph v. White*, 12 N. Y. 296; *Allen v. Culver*, 3 Den. 284; *Gorton v. Gregory*, 3 B. & S. 90.

<sup>4</sup> *Slingsby's Case*, 5 Co. 18, b; *Lahy v. Holland*, 8 Gill, 449; *James v. Emery*, 8 Taunt. 245; *Quackenboss v. Lansing*, 6 Johns. 49; and per Denman, C. J., in *Hopkinson v. Lee*, 6 Q. B. 964, 970.

<sup>5</sup> Per Gibbs, J., in *James v. Emery*, *supra*; *Jacobs v. Davis*, 34 Md. 204; *Withers v. Bircham*, 3 B. & C. 254. The New York Code of Pro-



the land, and a covenant to renew is consequently binding upon the assignee of the reversion. So the grant of an additional term or of a right to purchase is, for many purposes, to be considered a continuation of the former lease; and if there is nothing in the lease to show that such right or renewal was intended to be confined personally to the lessee, they will inure to his assignees or executors, without their being particularly named.<sup>1</sup> Covenants running with the land are divisible, and will bind the assignee of a part of the estate demised, in respect to the parcel assigned to him, as to repair, or to pay rent of the part occupied by him.<sup>2</sup>

§ 263. **Personal, as not concerning Land, bind Covenantor only.** — A personal covenant is one which does not affect the land demised, but is merely collateral to it. Instead of running with the land and binding those who enter into possession as assignees, it affects only the covenantor during his lifetime, and the assets of his estate in the hands of its representatives after his death, by reason of the privity of estate. Of this description are covenants of seisin, of a right to convey, and against incumbrances.<sup>3</sup> If these are not true, there is a breach of them as soon as the deed is executed, and the lessee's right of action is at once complete; but, being mere

<sup>1</sup> *Piggot v. Mason*, 1 Paige, 412; *Winslow v. Tighe*, 2 Ball & B. 195; *Randall v. Russell*, 3 Mer. 196; *Hyde v. Skinner*, 2 P. Wms. 196; *Roe v. Hayley*, 12 East, 469; *Vernon v. Smith*, 5 B. & A. 11; *Wilkinson v. Pettit*, 47 Barb. 230. *Barclay v. Steamb. Co.*, 6 Phila. 558. Thus the right to have a conveyance of the premises during or at the end of the lease at a fixed price passes. *Napier v. Darlington*, 70 Pa. St. 64; *Willard v. Taylor*, 8 Wall. 557; *Hagar v. Buck*, 44 Vt. 285.

<sup>2</sup> *Stevenson v. Lambard*, 2 East, 575. Where a covenant which runs with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to different individuals, the covenant will attach upon each parcel *pro tanto*; and the assignee of each parcel will be answerable for a proportionate part of the common burden, and will be exclusively liable for the breach of any covenant which related to his part alone. *Astor v. Miller*, 2 Paige, 68; *Van Horne v. Crain*, 1 *id.* 455; *Shep. Touch.* 199; *Co. Lit.* 385, a.

<sup>3</sup> *Sprague v. Baker*, 17 Mass. 588; *Gilbert v. Bulkley*, 5 Conn. 262; *Pilsbury v. Mitchell*, 5 Wisc. 17; *Redwine v. Brown*, 10 Ga. 311.



in which they stand in the deed.<sup>1</sup> If dependent, they are in the nature of conditions, and are precedent each to the other; and in that case the non-performance of one is not only a defence to the exaction of performance by the other, but is ground for an action without a tender of performance by such other.<sup>2</sup> If, however, they are independent, as where a landlord engages to keep the premises in repair, or to place certain improvements upon them within a specified time, his non-performance does in neither case discharge the tenant's covenant to pay rent.<sup>3</sup> But where acts are to be done simultaneously, and each is the consideration of the other, the covenants are dependent,<sup>4</sup> and neither party can recover against the other without showing performance or an offer to perform on his part. Our courts, too, are generally averse to holding covenants to be independent of each other, since it is manifestly unjust that one party should refuse to be bound, and yet be allowed to enforce performance against the other; nor will they give such a construction to them, unless the intention of the parties is clearly manifest.<sup>5</sup>

<sup>1</sup> *Tompkins v. Elliott*, 5 Wend. 496; *Jones v. Barkley*, 2 Doug. 684; *Gardiner v. Corson*, 15 Mass. 504; *Parmelee v. Oswego & S. R. R.*, 6 N. Y. 74; *Grant v. Johnson*, 5 *id.* 247; *Selden v. Pringle*, 17 *id.* 458. Thus a covenant not to injure crops and a covenant to pay the amount of injury found by arbitrators are independent, and suit may be brought though there is no arbitration. *Dawson v. Fitzgerald*, 1 L. R. Exch. Div. 257.

<sup>2</sup> *West v. Emmons*, 5 Johns. 179; *Slocum v. Despard*, 8 Wend. 615; *Morris v. Sliter*, 1 Den. 59; *Couch v. Ingersoll*, 2 Pick. 292. Where one agreed to labor, and the other to furnish a house for him during the time he was to labor, the covenants were held to be independent. *Betts v. Perrine*, 14 Wend. 219. A covenant by a lessor that the lessee paying the rent and performing the covenants shall quietly enjoy, is not a conditional covenant, and a plea stating the non-payment of the rent, or the non-performance of a covenant by the lessee (to insure), is no bar to an action by the lessee on the covenant for quiet enjoyment. *Dawson v. Dyer*, 5 B. & Ad. 584.

<sup>3</sup> *Tibbitts v. Percy*, 24 Barb. 89; *Ellis v. M'Cormick*, 1 Hilt. 318. And see *post*, § 331.

<sup>4</sup> *Dakin v. Williams*, 11 Wend. 67; *Day v. Essex Bank*, 18 Vt. 97; *Parker v. Parmelee*, 20 Johns. 136. To be dependent they must be mutual and go to the entire consideration. *Butler v. Many*, 52 Mo. 497.

<sup>5</sup> *Mecum v. Peoria R. R. Co.*, 21 Ill. 533; *Pegues v. Mosby*, 17 Miss. 569; *Clopton v. Bolton*, 23 *id.* 78; *Bangs v. Lowber*, 2 Cliff. 157.

§ 266. **Void when Deed is void or there is no Estate in the Covenantor.** — Covenants may be void when considered with reference to the instrument in which they are contained, as well as to the estate on which they depend. Thus, where a deed is void, all the covenants dependent on the interest professed to be conveyed by it are also void.<sup>1</sup> And a lessee professing to assign over a term, which in fact had no existence, is not liable at the suit of a subsequent assignee on a covenant for quiet enjoyment.<sup>2</sup> The same rule holds where a lease is void for uncertainty; as where one possessed of a term for years granted so much of the term as should be unexpired at the time of his death, and the grantee assigned and covenanted with the assignee for quiet enjoyment; it was held that the uncertainty annulled the original lease, and that the covenant could not subsist without an estate, and as no estate passed, the assignee could not maintain an action.<sup>3</sup>

§ 267. **Illegal, or against Public Policy, void.** — A covenant to do anything, which upon the face of it appears to be prejudicial to the public interest, or is otherwise contrary to law, is void.<sup>4</sup> And so general is the approbation of this rule that courts will not aid either party in enforcing an illegal executory contract; nor, if executed, will they assist in setting it aside, or in recovering back what has passed under it.<sup>5</sup> So, if made within the prohibition of a statute, it is void, though the act be merely prohibitory in its terms.<sup>6</sup>

<sup>1</sup> *Soprani v. Skurro*, Yelv. 18.

<sup>2</sup> *Noke v. Awder*, Cro. El. 373; s. c. *id.* 436.

<sup>3</sup> *Capenhurst v. Capenhurst*, T. Ray. 27; *Waller v. Dean of Norwich*, Owen, 136; *Waters v. Same*, 2 Brownl. & G. 158; *Wade v. Merwin*, 11 Pick. 280; *Phelps v. Decker*, 10 Mass. 267.

<sup>4</sup> *Lowe v. Peers*, 4 Burr. 2225; *Shep. Touch.* 163; *Pratt v. Adams*, 7 Paige, 615; *Smith v. Albany*, 7 Lans. 14.

<sup>5</sup> *Nellis v. Clark*, 20 Wend. 24; s. c. 4 Hill, 424; *Chamberlin v. Barnes*, 26 Barb. 160, 163. And the assignee of such a contract stands in no better position than his assignor. *Saratoga Bk. v. King*, 44 N. Y. 87. If part of an entire contract is void, the whole is void. *Crawford v. Morell*, 8 Johns. 253.

<sup>6</sup> *Norwich v. New Berlin*, 18 Johns. 382; *Powers v. Shepard*, 48 N. Y. 540; *Barton v. Port Jackson Co.*, 17 Barb. 397.

And if a man covenants not to do a thing which it is lawful for him to do, and a subsequent act of the legislature compels him to do it, the act repeals the covenant; or if he covenants to do a certain thing, and then a statute is made, which compels him not to do it, the covenant is void. But if he covenants to do a thing which is unlawful at the time, and, afterwards, a statute makes it lawful, the covenant is not repealed.<sup>1</sup> Or if he covenants to do a thing which is unlawful by statute, the covenant will not be made lawful by a repeal of the statute; for the covenant was void *ab initio*.<sup>2</sup> A covenant to do an impossible thing is also void; but the impossibility must exist at the time of making the covenant, for if it be then possible, and afterwards becomes impossible, the covenantor will still be liable upon the express words of his covenant.<sup>3</sup> And if the lease be void, as for an uncertainty in its continuance or otherwise, all the covenants contained in it are void likewise.<sup>4</sup>

§ 268. **Oppressive, Equity will not enforce.**—Although a covenant may not be absolutely void or illegal, it may yet be of so hard and oppressive a character, that a court of equity will refuse to enforce it. Thus, where a lease of mines contained a covenant that if the lessor should, at any time before the expiration or termination of the lease, give notice in writing to the lessee of his desire to take all or any part of the machinery, stock in trade, or implements, in or about the

<sup>1</sup> *Brick Presb. Ch. v. Mayor*, 5 Cow. 538; *Heskeath v. Grey*, Buller, N. P. 165; 1 Salk. 198. But see *Benson v. Dean*, 3 Mod. 39.

<sup>2</sup> *Jaques v. Withy*, 1 H. Bl. 65.

<sup>3</sup> *Blight v. Page*, 3 B. & P. 295; *Paradine v. Jane*, Aleyn, 26; *Hickman v. Raye*, 55 Ind. 551. In *Hills v. Thompson*, 13 M. & W. 487, the lessee covenanted to raise a given quantity of coal or pay a certain rent. He was held to this, though there was not so much coal in the lot demised. In *Clifford v. Watts*, L. R. 5 C. P. 577, however, an agreement by lessee to dig not less than 1000 tons of clay was held excused if there was not so much to be found. It is laid down that there are two classes of cases where the covenantor is held notwithstanding a physical impossibility: *first*, where it supervenes after the making of the covenant, whether by act of God or of some human agency other than the covenantee; *second*, where the covenantor warrants the possibility.

<sup>4</sup> *Soprani v. Skurro*, Yelv. 18; *Capenhurst v. Capenhurst*, 1 Lev. 45.

mines, then the lessee would, at the expiration of the lease, deliver the articles specified in the notice to the lessor, on his paying the value of them, such value to be ascertained in the manner therein mentioned,—it was held to be a covenant so injurious and oppressive to the lessee that the court would not enforce it, or grant an injunction to prevent a breach of it.<sup>1</sup>

§ 269. **How discharged. — How released by Act of Covenant-tee.** — A covenantor cannot, by any act of his own short of performance, discharge, or in any manner qualify his express covenant, without the concurrence of the covenantee.<sup>2</sup> Nor can the covenantee himself discharge it by an instrument which is not under seal.<sup>3</sup> But any positive act of prevention by the covenantee will release the covenantor from performance; as, if a man covenants with another to collect his rents in a certain town, and then prevents or interrupts him in some way;<sup>4</sup> or if a lessee for years covenants to drain the water out of the land, or to build a house before such a day, and the lessor enters before that day, and holds the lessee out.<sup>5</sup> The covenant, however, would not be dispensed with, if the covenantee merely forbids the covenantor to proceed with the draining or building.<sup>6</sup>

§ 270. **Performance rendered Impossible by one Party, Rights of other Party may be Enforced.** — Where the act of one party hinders the performance of a covenant by the other, performance is excused, and the thing contracted to be done by the former may be enforced by suit, without averring performance; and proof of such conduct will support the averment of performance.<sup>7</sup> So the omission of the covenantee to do some act necessary on his part to the execution of the

<sup>1</sup> Talbot v. Ford, 13 Sim. 173.

<sup>2</sup> Stone v. Dennis, 3 Porter, 231; Clancy v. Overman, 1 Dev. & B. 402.

<sup>3</sup> Harper v. Hampton, 1 H. & J. 622.

<sup>4</sup> Shaw v. Hurd, 3 Bibb, 371; Borden v. Borden, 5 Mass. 67.

<sup>5</sup> Carrel v. Read, Cro. El. 374.

<sup>6</sup> Barker v. Fletwel, Godb. 69; Porter v. Stewart, 2 Aik. 427.

<sup>7</sup> Marshall v. Craig, 1 Bibb, 379; Couch v. Ingersoll, 2 Pick. 292; Farnham v. Ross, 2 Hall, 167.

covenant may also be a ground for excusing the covenantor; as, if a man covenants to convey an estate to another for his life and the lives of two such other persons as the covenantee should name, and to deliver quiet possession before the Christmas following, the neglect of the covenantee to name the lives is a sufficient excuse for the non-performance of the covenant by the other also.<sup>1</sup> So, where the whole consideration fails, and a stipulation becomes incapable of being substantially performed in the manner intended by the parties, by the voluntary act of either, the other is not bound to proceed, but is at liberty to decline performance on his part.<sup>2</sup> And if performance of another thing, or at another time, has been accepted in lieu of the thing or the time stipulated, it is a sufficient excuse for the non-performance of the letter of the contract.<sup>3</sup> The voluntary destruction of one of the seals of a deed where the covenants are joint will discharge both covenantors; but if the covenants are several, the breaking of one of the seals by a covenantee will invalidate the instrument only so far as concerns him whose seal is taken off.<sup>4</sup> But where the seals are torn off by a stranger, or by one with whom the instrument was left for safe-keeping, it does not vitiate the deed, and an action of covenant may still be maintained on it.<sup>5</sup>

## SECTION II.

### OF CONDITIONS.

§ 271. **Defined.** — **In Law or Deed.** — A *condition* is a qualification annexed to an estate by the grantor, whereby the estate may be enlarged, defeated, or created, upon an uncertain event. And to be effectual, the words made use of must import that

<sup>1</sup> *Twyford v. Buntley*, Freem. 121; *Parker v. Parmele*, 20 Johns. 130; *Edwick v. Hawkes*, 18 Ch. D. 199.

<sup>2</sup> *Kleine Catara*, 2 Gallis, 74.

<sup>3</sup> *Warren v. Maims*, 7 Johns. 476.

<sup>4</sup> *Matthewson's Case*, 5 Co. 22, b; *Collins v. Prosser*, 1 B. & C. 682; s. c. 3 Dow. & Ry. 112.

<sup>5</sup> *Rees v. Overbaugh*, 6 Cow. 746. And see *ante*, § 165.

the vesting or continuance of the estate is to depend upon the supposed contingency. Its principles apply to leases, as well as to conveyances in fee. It may be inserted in the lease, or indorsed upon it, or even contained in a separate instrument, provided only, that such indorsement or separate instrument shall have been executed contemporaneously with the lease.<sup>1</sup> Conditions, according to Littleton, are either *in law* or *in deed*. A condition in deed is that which is expressed in the deed by which it is created; a condition in law is that which arises by necessary implication from the circumstances of the case. This latter doctrine of estates upon condition in law is said by Mr. Chancellor Kent to be of feudal extraction, and to result from the obligations arising out of the feudal relation. There was a tacit condition annexed to every tenancy, that the tenant should not do any act to the prejudice of the reversion. If he committed waste, or did any other act which, in the eye of the law, tended to defeat or divest the estate in reversion, the particular estate was forfeited. Even the rents and services of the feudatory were considered as conditions annexed to his fief; and for the non-payment or non-performance of any of them, the lord might re-enter without a reservation to that effect in the deed creating the estate.<sup>2</sup> A condition has strictly for its object the defeating or avoiding an estate; but where an estate is to be created or enlarged, it is technically upon a limitation, the province of which is, to mark the period or event for the commencement, and the time of duration of the estate, whether it be in fee, for years, or for life, and therefore relates to the determinable qualities of an estate.<sup>3</sup>

<sup>1</sup> Griffin v. Stanhope, Cro. Jac. 456; Craig v. Wells, 11 N. Y. 815; Van Rensselaer v. Ball, 19 *id.* 100. In New York a stipulation for the payment of rent, in a conveyance in fee, with a right of re-entry to the grantor or his heirs in default of payment, is held to be a condition to the grant. *Id.*

<sup>2</sup> 4 Kent, Com. 121.

<sup>3</sup> A clause in a lease, that the lessee will deliver up the premises and all the buildings and repairs put thereon by him, on three months' notice, and the payment to him of two hundred and fifty dollars, is not a condition but a covenant, and the lessee's estate is not determined by an offer of the lessor to pay him that sum of money. Wheeler v. Dascomb, 3 Cush. 285.

§ 272. **In Law, are absolute Limitations of the Estate.** — In fact, are **Provisos merely.** — Conditions in law are of the nature of limitations, by which, upon the happening of a contingency, the estate becomes *ipso facto* terminated. As, if an estate be made to A. for years, if I. S. so long live, this is a limitation by which the estate of A. is terminated immediately upon the death of I. S. Or, if an estate be granted to a man and his wife during coverture, they have an estate for life, liable to become extinct upon the dissolution of the coverture; and upon such a limitation, the next subsequent estate becomes vested immediately upon the determination of the first estate, and the remainder-man may enter.<sup>1</sup> A condition in a deed, however, is only a proviso that the grantee shall or shall not do a particular act, the breach of which will not, *ipso facto* or without entry, defeat the estate, but will only give the grantor, his heirs or assigns, a right to re-enter, and by such entry, avoid the estate.<sup>2</sup> Partaking of the nature of the leases to which they are attached, a condition annexed to a term of years may be created by parol, when the lease is so created; but a condition annexed to a freehold lease can only be by deed.<sup>3</sup>

§ 273. **Conditions and Limitations, Distinguished.** — The principal difference between a *condition* and a *limitation* is, that a condition does not defeat the estate when broken, until it is

<sup>1</sup> Co. Lit. 214, b; Mary Portington's Case, 10 Co. 41; Shep. Touch. 117.

<sup>2</sup> A clause in a lease providing for its termination at the lessor's election, on default of rent, although in the form of a mere stipulation, is still a condition, since it provides for ending the term and the forfeiture of the estate in case of a default. *Horton v. N. Y. Cent. R. R.*, 12 Abb. (N. C.) 30. So where the provision is that failure to pay shall be considered an abandonment. *Bowyer v. Seymour*, 13 W. Va. 12.

<sup>3</sup> Co. Lit. 214, b. Where an estate is so expressly limited by the words of its creation that it cannot endure for any longer time than until the contingency happens upon which the estate is to fail, this is a limitation. On the other hand, when an estate is expressly granted upon condition in deed, the law permits it to endure beyond the time of the contingency happening, unless the grantor takes advantage of the breach of condition by entering. And this rule applies to estates for years, even where the condition is that the estate shall be void. See *post*, §§ 288, 492, and notes.



avoided by an act of the grantor or his heirs; but a limitation marks the period which is to determine the estate, without entry or claim,<sup>1</sup> and no act is necessary to vest the right in him who has the next expectant interest.<sup>2</sup> Whether the particular form of words made use of amounts to a condition, a limitation, or a covenant merely, is matter of construction, depending upon the true intent and meaning of the contract. Thus, where a lease contained a clause that, in case of a violation of any of its conditions, the relation of landlord and tenant should, at the option of the landlord, wholly cease, it was held that it did not amount to a conditional limitation, which would absolutely determine the estate by the mere breach of the condition.<sup>3</sup> The intention of the party to the instrument, when clearly ascertained, will, of course, always control; but conditions and limitations are not to be raised by mere inference or argument. The distinctions on this subject which are to be found in the books are very subtle and artificial; and the construction of any contract will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in each particular case.<sup>4</sup>

<sup>1</sup> *Stearns v. Godfrey*, 16 Me. 160; *Johnson v. Godfrey*, 52 Tex. 222; 1 Prest. Est. 45.

<sup>2</sup> *Den v. Hance*, 6 Halst. 244; 1 Prest. Est. 46.

<sup>3</sup> *Beach v. Nixon*, 9 N. Y. 35. And, in general, where a lease contains a clause that the landlord *may* re-enter upon the breach of a condition, the lease is not avoided by a breach, but only made voidable at his election; and the estate will continue after breach, unless the landlord exercises his election. *Stuyvesant v. Davis*, 9 Paige, 427; *Arnsby v. Woodward*, 6 B. & C. 519; *Dakin v. Cope*, 2 Russ. 174; *Meni v. Rathbone*, 21 Ind. 454. So though the stipulation is that it shall become void and lessor may re-enter. *Doe v. Birch*, 1 M. & W. 402; *Jones v. Carter*, 15 *id.* 718; *Hayne v. Cummings*, 16 C. B. n. s. 421; *Penoyer v. Brown*, 13 Abb. (N. C.) 82; *Janes v. Emery Oil Co.*, 1 Penny. (Pa.) 242; and see *Blair v. Peck*, *id.* 247; *post*, §§ 288, 492, and notes.

<sup>4</sup> 4 Kent, Com. 132. A covenant to surrender, &c. (on the lessor's paying for the improvements), is not conditional. Words thus parenthetically inserted have never been adjudged a condition; and to make them such, other words defining the meaning, and leaving no doubt of the intention of the parties, must be added. *Tallman v. Coffin*, 4 N. Y. 134; *Jackson v. McClallen*, 8 Cow. 295. The apt technical words to



§ 274. **Implied Conditions.**—Some conditions are implied in the relation of landlord and tenant without the insertion of any particular words in the lease; as, that a tenant shall always have the quiet enjoyment of the premises. Also, that he shall not create a greater estate than he received from the grantor; for, according to the common-law doctrine, if a tenant for life made a feoffment in fee, it produced a forfeiture of his estate.<sup>1</sup> But this latter relic of feudalism has been abolished in most of the States, and would not now, probably, produce so unreasonable a result anywhere; the grantee, in such case, taking the same estate that the grantor himself had, and no other.<sup>2</sup>

§ 275. **Precedent and Subsequent.**—Where the condition must be performed before the estate can commence, it is called a *condition precedent*; but where the effect of a condition is either to enlarge or defeat an estate already commenced, it is called a *condition subsequent*. The former avoids the estate, by not permitting it to vest until literally performed; while the non-performance of the latter defeats the estate by divesting the party of his title, and the interest already vested; because its continuance is made to depend upon the performance of the act, or the happening of the stipulated contingency. Thus if an estate be limited to A., upon his marriage with B., the marriage is a precedent condition, and until that happens no estate vests in A. Or if a man make a lease of land to I. S. for ten years, provided that if he pays the lessor a certain sum of money on a given day, he shall have the land to him and his heirs, this is also a condition precedent, and must be fulfilled before the estate can take

be used in creating a limitation upon the term granted by a lease are "while," "as long as," "until," and "during." 2 Bl. Com. 155; *Vanatta v. Brewer*, 32 N. J. Eq. 26.

<sup>1</sup> Co. Lit. 233, b. It was a rule arising out of reasons connected with military tenures, that if the feudal tenant denied that he held the feud of his lord, or did any other act inconsistent with his actual relations to the lord, such denial or inconsistency produced a forfeiture of his whole estate, and this principle applied to leases, as well as to estates in fee. 1 Cruise, Dig. 266, § 40.

<sup>2</sup> *Delancy v. Ganong*, 9 N. Y. 9; 1 N. Y. R. S. 738, § 136.

effect. But where a lease is made for years, on condition that the lessee shall pay a sum of money on a certain day, or else his estate shall be void, this is a condition subsequent; for here the estate vests, but its continuance depends upon the breach or performance of the condition.<sup>1</sup> So the landlord's agreement to fit up a store and introduce the street water upon the premises is not a condition precedent to the landlord's right to demand rent where the lessees have actually occupied.<sup>2</sup>

§ 276. **Inferred from Construction of Instrument and Intent of Parties.**—No precise words are required to make a stipulation a condition precedent or subsequent; and whether it shall be construed as a covenant or a condition does not depend on its position in the instrument, but upon the period fixed for performance, as well as on the nature of the transaction, and the intention of the party creating the estate. Thus where after the usual covenants by the lessee to pay rent, &c., it was stipulated that he might determine the lease during the term, on giving six months' notice *from* and *after* a fixed period, and the performance of his covenants, — it was held that such performance was a condition precedent to the exercise of his right to determine the lease;<sup>3</sup> that conditions were to be construed to be either precedent or subsequent, according to the fair intention of the parties, as they could be collected from the instrument; that technical words, if there were any to render such intent doubtful, should give way to the intention; and that it was impossible to read this lease without seeing that

<sup>1</sup> Wells v. Smith, 2 Edw. 78; Taylor v. Mason, 9 Wheat. 325; Shep. Touch. 17.

<sup>2</sup> M'Cullough v. Cox, 6 Barb. 386; Emmons v. Scudder, 115 Mass. 367. But if the lessee refuses to take possession he may resist the payment of a note given for rent in advance. Hickman v. Rayl, 55 Ind. 551.

<sup>3</sup> Hotham v. E. Ind. Co., 1 T. R. 645; Powers v. Ware, 2 Pick. 451; Goodwin v. Lynn, 4 Wash. C. C. 714; Tompkins v. Elliot, 5 Wend. 496; Gardner v. Corson, 15 Mass. 500; Nicol v. N. Y. & E. R. R., 12 N. Y. 121; Jones v. Barkley, 2 Doug. 684; Parmelee v. Oswego R. R., 6 N. Y. 74; Grant v. Johnson, 5 N. Y. 247; Hopkins v. Young, 11 Mass. 302. In People's Bank v. Mitchell, 6 N. Y. W. R. 476, the tenant's covenant to pay taxes was held a condition precedent to the landlord's covenant to pay appraised value.

the parties intended that the tenant should do every thing required of him before he could put an end to the lease.<sup>1</sup> But it is only where covenants go to the whole consideration that they form conditions precedent, and where one party covenants to do one thing, the other party doing another, the engagement of the other is no condition precedent,<sup>2</sup> but the

<sup>1</sup> *Porter v. Shepherd*, 6 T. R. 665. This case was sustained in *Friar v. Grey*, 15 Q. B. 891; s. c. 5 Exch. 584, 597; affirmed finally in the House of Lords, 4 H. L. Ca. 565, after prolonged discussion. It carries this doctrine of law to an extreme, as the non-performance in any particular of the lessee's covenants entirely defeats his rights under the lease, and it is maintainable only on the ground that a peculiar privilege was granted to him, and so was properly restrained by the condition. A contrary doctrine, at least as respects rights of one party to the contract on the ordinary obligations of the other party, was laid down in *Boone v. Eyre*, 2 W. Bl. 1312; *Carpenter v. Creswell*, 4 Bing. 409, and other cases. Thus, in *Newson v. Smithies*, 3 Hurlst. & N. 840, where lessor was to pay lessee for manure on his delivering up the premises, if in the meantime he had observed "all covenants, &c." it was held that observance of every one was not a condition precedent to his enforcing the lessor's covenant. Where, however, the obligation of one party is expressly to precede the other's in performance, it forms a condition precedent; as where the lessee covenants to repair, the premises having first been repaired by lessor: *Neale v. Ratcliff*, 15 Q. B. 916; *Hunt v. Bishop*, 8 Exch. 675; *Hutchinson v. Read*, 4 *id.* 761; or where the lessee accepts the demise on consideration of lessor's repairing: *Tidey v. Mallet*, 16 C. B. n. s. 268; *Coward v. Gregory*, L. R. 2 C. P. 153; *Wright v. Lattin*, 38 Ill. 293; *Hickman v. Rayl*, 55 Ind. 551. But even here, if a concurrent obligation is expressed, though partly to precede the tenant's, it is no condition; as where the lessor covenanted "first to repair and keep in repair." *Cannock v. Jones*; 3 Exch. 233; *Dean of Bristol v. Jones*, 1 Ellis & E. 484. And see American cases to the same effect. *Harding v. Kretsinger*, 17 Johns. 293; *Gazley v. Price*, 16 *id.* 267; *Jones v. Gardner*, 10 *id.* 266; *Hopkins v. Young*, 11 Mass. 302; *Gardiner v. Corson*, 15 *id.* 500; *Northrup v. Northrup*, 6 Cow. 296; *Dox v. Day*, 3 Wend. 356; *Lewis v. Weldon*, 3 Rand, 71; *Conn v. Lewis*, 5 Litt. 66; *Alexander v. Mann*, 6 T. B. Monr. 360; *Bank of Columbia v. Hagner*, 1 Pet. 464. Upon the principle laid down in *Porter v. Shepard*, *supra*, it is held that performance of all the covenants in a lease, under which a lessee is in possession with privilege of renewal at the end of the term, are conditions precedent to the exercise of the right of renewal. *Behrman v. Barto*, 54 Cal. 131.

<sup>2</sup> *Tileston v. Newell*, 13 Mass. 406; *Carpenter v. Creswell*, 3 Bing. 409; *Pepper v. Haight*, 20 Barb. 429; *Bennett v. Pixley*, 7 Johns. 249; *Grant v. Johnson*, 5 N. Y. 247.

covenants are mutual.<sup>1</sup> So a grant of land to a town, to use and improve for ever, and not to be sold, but rented out, and the rents applied to the support of the minister in the town; or a grant for the purpose of building a school-house for the use of a school, *provided it be built on a certain site*, — is, in either case, on a condition subsequent.<sup>2</sup>

§ 277. **Precedent, how Construed. — Equitable Relief from. —** Conditions precedent which are to create an estate will always receive a liberal construction, for the purpose of carrying into effect the intention of the parties; and if the condition is performed as near the intent as possible, it will usually be sufficient; but conditions which are to defeat an estate will be construed strictly.<sup>3</sup> From the nature of a condition, it is obvious that equity cannot relieve from the forfeiture of an estate which arises upon a condition precedent unperformed. But it is different as to the breach of a condition subsequent which would work a forfeiture or divest an estate; for there a court of equity, acting upon the principle of compensation, will interpose, and prevent the forfeiture or divestment, provided that satisfactory amends can be made in damages.<sup>4</sup>

<sup>1</sup> *Boone v. Eyre*, 2 W. Bl. 1312; *Carpenter v. Creswell*, *supra*; *Hickman v. Rayl*, *supra*; *Doe v. Kennard*, 12 Q. B. 244; where there was a proviso in the lease that lessee should surrender, and lessor might take possession on giving notice and paying compensation, and it was held that payment of the compensation was no condition precedent. See also *Parsons v. Miller*, 15 Wend. 561; *Bartlett v. Greenleaf*, 11 Gray, 98, where the lessee's covenant to pay rent was held no condition precedent to lessor's covenant for quiet enjoyment. So, on a stipulation in a five years' lease for the lessee to have the privilege of five years more, provided all improvements were done by him, it was held these might be done during the latter five years. *Palethorp v. Bergner*, 52 Pa. St. 149.

<sup>2</sup> *Hayden v. Stoughton*, 5 Pick. 528; *Brigham v. Shattuck*, 10 Pick. 309.

<sup>3</sup> *Ld. Ray*. 335; *Co. Lit.* 220, a. Hence a reference in a lease to a prior lease and its condition will incorporate the condition in relation only to such covenants as it applied to in the former lease. *Crawley v. Rice*, L. R. 10 Q. B. 302. So a condition against using demised premises for other purposes than a post-office is not broken by the issue of dog licenses and taking pay therefor. *Wadham v. Postm. Gen.*, L. R. 6 Q. B. 644.

<sup>4</sup> *Walker v. Wheeler*, 2 Conn. 299; *Wells v. Smith*, 2 Edw. 78; *Scott v. Tyler*, 2 Bro. C. C. 431; *Duffield v. Elwes*, 1 Sim. & S. 239.

§ 278. **Words to create.**—The words generally used to make a condition are, *upon condition*<sup>1</sup> or *provided that*; but the words made use of may import both a condition and a covenant. As, if in a lease for years the words were, *provided always, and it is covenanted and agreed between the parties that the lessee shall not alien*, there is both a condition by force of the proviso, and a covenant by virtue of the other words.<sup>2</sup> So if a power of re-entry for the breach of a covenant is added to such covenant, it has the force of a condition.<sup>3</sup> If it is doubtful whether the clause in question is a condition or a covenant, the court will incline to the latter construction; for a covenant is preferable for a tenant. But where a man covenanted and agreed to let his land to another for five years, provided always that the lessee should pay him annually, during the term, a certain sum of money, it was held to be a covenant for the payment of rent, as well as a condition, the non-performance of which might defeat the estate.<sup>4</sup>

§ 279. **Effect of certain Words to Create.**—The word *proviso* in a lease implies a condition, unless there are subsequent words which change it into a covenant, or a penalty is annexed for non-performance. But where the proviso is that the lessee shall perform or not perform a thing, and no penalty is annexed, it is a condition; upon annexing a penalty, it becomes a covenant.<sup>5</sup> The words *yielding and rendering* do not amount to a condition, and merely import a covenant to pay rent, unless the landlord would otherwise be without remedy in case the rent should not be paid.<sup>6</sup> Mere words in restraint of a grant do not make a condition; as, if the lessor grants *firewood, provided he do not take it of the great trees*, it

<sup>1</sup> *Crawley v. Mullins*, 48 Mo. 517.

<sup>2</sup> Co. Lit. 203, b; *Doe v. Watt*, 8 B. & C. 308. But mere words of contract will not make a condition if there is no clause of re-entry. *Shaw v. Coffin*, 14 C. B. N. s. 372; *Crawley v. Rice*, L. R. 10 Q. B. 302.

<sup>3</sup> *Jackson v. McClallen*, 8 Cow. 295. And such a clause will apply to negative covenants. *Wadham v. Postm. Gen.*, *supra*.

<sup>4</sup> *Livingston v. Stickles*, 8 Paige, 398.

<sup>5</sup> *Jackson v. Allen*, 3 Cow. 221; *Gray v. Blanchard*, 8 Pick. 284; *Simpson v. Titterell*, Cro. El. 242.

<sup>6</sup> *Delancy v. Ganong*, 9 N. Y. 9.

may be waste, but no cause of re-entry, if he does take of the great trees. Nor will insensible words make a condition; as a lease of forty years to a woman upon condition *if she lives so long and keeps herself such*, without further explanation as to how she is to keep herself; for the intent is uncertain.<sup>1</sup>

§ 280. **Created by Separate Instrument. — Time within which to Perform.** — A lessor having the unlimited disposal of his property may annex whatever conditions he pleases to his grant, provided they are not illegal or inconsistent.<sup>2</sup> But they can only be annexed to an estate at the time of its creation, and may be by a separate deed, distinct from that which creates the estate, provided it is sealed and delivered at the time of executing the principal deed.<sup>3</sup> If written on the back of a lease, before or at the time the lease is executed, it is valid.<sup>4</sup> Where the prompt performance of a condition is necessary, to give the grantee the whole benefit designed to be secured to him, or where immediate enjoyment constituted the motive for the contract, the grantee forfeits the estate unless he performs the condition in a reasonable time.<sup>5</sup> But if no time is limited for the performance of the condition, the grantee has, in general, his whole lifetime for performance.<sup>6</sup>

<sup>1</sup> Com. Dig. Condition (A.), 6; 3 Leon. 16; Hardy v. Seyer, Cro. El. 414. A covenant to surrender, &c., "on the lessor's paying for the improvements," is not conditional. Words thus parenthetically inserted have never been adjudged a condition; and to make them such, other words, defining the meaning and leaving no doubt of the intention of the parties, must be added. Tallman v. Coffin, 4 N. Y. 134; Jackson v. McClallen, 8 Cow. 295. A stipulation at the end of a lease, not to make any alterations in the buildings without the consent of the lessor, is not a condition for the breach of which the lease will be forfeited. Jackson v. Harrison, 17 Johns. 66.

<sup>2</sup> Lord Cromwell's Case, 2 Co. 69; Roe v. Galliers, 2 T. R. 133. A landlord may annex to his lease whatever conditions he pleases, provided they are not contrary to reason or public policy. Brugman v. Noyes, 6 Wisc. 1. A variety of provisos and conditions will be found in Appendix, No. XI.

<sup>3</sup> Griffin v. Stanhope, Cro. Jac. 456; Goodright v. Mark, 4 M. & S. 30.

<sup>4</sup> *Id.*; Fowell v. Forrest, 2 Saund. 48; Shep. Touch. 126.

<sup>5</sup> Hamilton v. Elliott, 5 S. & R. 884.

<sup>6</sup> Per Marshall, C. J., Finlay v. King's Lessee, 3 Pet. 376.

And if a precedent act is to be performed at a certain time or place, and a strict performance is prevented by the absence of the party who has the right to claim it, the law will not permit him to set up the non-performance of the condition as a bar to the responsibility which his part of the contract had imposed upon him.<sup>1</sup>

§ 281. **Impossible Conditions Void.** — If a condition *subsequent* is impossible at the time of its creation, or becomes so afterwards by the act of God, or the law, or of the grantor himself; or if it is contrary to law, or repugnant to the nature of the estate granted, — it is void, and the estate is absolutely vested in the grantee.<sup>2</sup> If a condition is in the disjunctive, giving the obligor liberty to do one thing or another at his election, and one part becomes impossible by the default of the other party, he is not bound to perform the other part. As if it be to make assurance to A. as he shall devise; or, upon default, to pay five hundred pounds; if A. does not tender an assurance, the other party need not pay the money. The same principle applies where one part becomes impossible by the act of God. But if one alternative was impossible at the time of making it, the obligor is still bound to perform the other. And where a lease was made to A., B., and C., with a proviso that if C. should demand any profits of the land, or enter into the same during the lifetime of A. or B. (who were his father and mother), that then the estate limited to C. should cease, and be utterly void, it was resolved that this was a void condition, forasmuch as it was repugnant to the estate limited.<sup>3</sup>

§ 282. **Breach of.** — **When Equity will enforce Forfeiture.** — A mere personal disability will not be allowed to excuse the non-performance of a condition; and therefore, where an estate

<sup>1</sup> Williams v. Bank, 2 Pet. 102.

<sup>2</sup> People v. Manning, 8 Cow. 297; McLachlan v. McLachlan, 9 Paige, 534; Holland v. Bouldin, 4 T. B. Monr. 147; Co. Lit. 206, a; Doe v. Carter, 8 T. R. 57; Scovel v. Cabell, Cro. El. 107; Merrill v. Emery, 10 Pick. 507.

<sup>3</sup> Com. Dig. Condition (K.), 2; Taylor v. Bullen, 6 Cow. 627; Moore v. Savil, 2 Leon. 132.



is granted to an infant or *feme covert* on condition, they are bound to strict performance; and, if broken during the minority of the infant, the land is lost for ever.<sup>1</sup> If it be a condition precedent, which is impossible, the grant is absolutely void, and the estate can never arise.<sup>2</sup> But as to a condition subsequent, which is never favored in law, its validity will depend upon its being such as the law will allow to divest the estate. And it is to be observed that a court of equity will never *lend its aid* for the purpose of divesting an estate, for the breach of a condition subsequent; because it tends to destroy estates, which it is the policy of the law to uphold; the relief which that court affords, being confined to cases where the forfeiture has been the effect of inevitable accident, and the injury produced capable of compensation in a pecuniary point of view.<sup>3</sup>

§ 283. **Repugnant or against Public Policy, void.** — In reference to estates which are determinable upon certain conditions, it is to be observed, also, that a condition must not be repugnant to the nature of the estate, or to the language of the grant;<sup>4</sup> nor must it be against the policy of the law, as an unwarrantable restraint upon trade, or marriage, or the power of alienation. Neither must it be a stipulation for that which is immoral. Conditions of this class are either to do something that is *malum in se* or *malum prohibitum*: to omit the doing of something that is a duty; or else to encourage such crimes and omissions. Such conditions the law will always, and without any regard to circumstances, defeat; being concerned to remove all temptations and inducements to crime.<sup>5</sup>

§ 284. **Against Alienation, when Void.** — It is a general rule, also, that a condition upon a feoffment in fee not to alien at all is void for repugnancy; for a man cannot dispose of his

<sup>1</sup> Williams v. Fry, 2 Lev. 21.

<sup>2</sup> Taylor v. Mason, *supra*; Arnold v. United States, 9 Cranch. 104; Weatherall v. Geering, 12 Ves. 504; Mookley v. Riggs, 19 Johns. 69.

<sup>3</sup> Pullen v. Ready, 2 Atk. 587.

<sup>4</sup> Depeyster v. Michael, 6 N. Y. 467.

<sup>5</sup> Mitchell v. Reynolds, 1 P. Wms. 189.



whole interest in a thing, and yet retain a control over it. But at common law, a grantee may be restrained from assigning for a particular time, or to a particular person; and so a condition in a lease that the grant shall become void, if the grantee becomes a bankrupt, has been held valid.<sup>1</sup> Yet Chancellor Kent questions whether a restraint of alienation to a particular person, who is named, would be a valid condition at the present day. It is certain, however, that courts now look with great jealousy upon all restraints on the free exercise of that inherent right of alienation which belongs to all estates in fee. For this reason, a devise of lands to the testator's children, *in case they continued to inhabit the town of Shirley, otherwise not*, was in New York considered to be unreasonable, and repugnant to the nature of the estate, and therefore entirely void.<sup>2</sup> So, where a lease in perpetuity contained a condition and covenant, that, upon every sale of the premises, the lessee or assigns should obtain the consent in writing of the lessor, and offer him the pre-emptive right to purchase, and if, after such offer, the premises were sold to any other person, one-tenth of the purchase-money should be paid to the lessor; and the lessee made a contract to sell, and agreed to pay the tenth of the sale to the owner of the rent and reversion, the purchaser actually taking possession under his contract to purchase,—it was held that the lessor had no remedy in equity; that such a covenant and condition was a restraint in the nature of a fine upon alienation; and that a court of chancery would not therefore interfere to enforce the performance of such covenants and conditions in cases where the landlord, by the terms of his lease, had not by his contract secured to himself a legal right, as distinguished from an equitable claim, to enforce a hard bargain for which the law gave him no right of action.<sup>3</sup>

§ 285. **Cases in which held Valid.**—In another case which previously arose in the Supreme Court of the same State, on a

<sup>1</sup> *Doe v. Carter*, 8 T. R. 57; Co. Lit. 223, a; *Mary Portington's Case*, 10 Co. 38, b.

<sup>2</sup> *Newkerk v. Newkerk*, 2 Caines, 345.

<sup>3</sup> *Livingston v. Stickles*, 8 Paige, 398.

similar covenant in a lease, to a man, his heirs and assigns forever, paying a certain rent, and that in case the lessee should propose to sell, he would first offer the property to the lessor, and if the lessor did not purchase, the lessee would pay him one tenth of the purchase-money, and if the lessee did not keep and perform all the conditions, the estate should cease, and the lease become void,—it was held that the condition was a lawful and valid condition, and that the nature of the estate created by such lease was a fee-simple conditional, or a fee-simple subject to be defeated upon a condition subsequent, by the failure or non-performance of which an estate already vested might be defeated. It was also said in this case that if the condition had been general, *not to alien*, it would have been necessarily repugnant, and therefore void; but that being a grant coupled with the condition that if the tenth of the proceeds of sale was not paid to the lessor the estate should be defeated, the lease would be forfeited upon a breach of such condition, and the lessor might re-enter.<sup>1</sup> But the Court of Appeals has since decided that the reservation in a lease in fee, of a pre-emptive right of purchase by the grantor and his heirs in case of a sale by the grantee, his heirs or assigns, and the reservation by the grantor of a right to a portion of the sale-money on such sale by the grantee, with a condition of re-entry if these terms were not complied with, are void, as repugnant to the estate granted, and as placing an illegal restraint upon the power of alienation.<sup>2</sup>

<sup>1</sup> Jackson v. Schutz, 18 Johns. 174.

<sup>2</sup> Depeyster v. Michael, 6 N. Y. 467. In this case the lessor, in addition to an annual rent, reserved a pre-emptive right on paying three quarters of the price demanded, otherwise, one fourth part of all moneys which should arise from the selling, renting, or disposing of the lands by the lessee, his heirs or assigns, when and as often as the same should be sold, rented, or disposed of. It seems from this case that, during the New York colonial government, the English statute of *quia emptores* was not regarded as in force. The object of that statute was to support military tenures, by securing to the chief lords of fees their escheata, wardships, &c.; and by transferring the tenure of lands from the *mesne* to the *chief lords* the statute entirely divested the former of any reversion whereby, on a forfeiture, the estate might revert to him. It was competent, therefore, for our citizens, unrestrained by such a law, and under the principles of feudal tenures, admitting of such reversion, to convey

§ 286. **Against doing Particular Acts.** — If the condition is, that the lessee will not do any particular act without leave from his lessor, when leave is once granted the condition is gone forever; for a condition must be construed strictly, and by one license it is satisfied.<sup>1</sup> But the license must be such as is required by the lease; and, therefore, where the lease

lands in fee, to be holden directly of them and their heirs; and such grantors, being entitled to the reversion or escheat on failure of the issue of the grantee, could lawfully annex conditions to the power of alienation. But the acts of 22 October, 1779 (1 Jones & Var. 44), transferring the seignior of all lands, escheats, &c., from the king to the people of this State, and the act of 20 February, 1787, concerning tenures (1 R. L. 70), put an end to all feudal tenures between one citizen and another, and substituted in their place a tenure between each landholder and the people in their sovereign capacity, and thus removed the entire foundation on which the right of the grantor to restrain alienation formerly rested. Those statutes are in their terms restrictive, and since their passage all restraints upon alienation contained in conveyances in fee, whether executed prior or subsequent to the date of those acts, are held to be void. But though this decision has not been qualified in the particular point decided, it has yet since been held that the statute of *quia emptores* was in force in New York before the statutes of 1779 and 1787, and also that the reservation of rent creates sufficient privity, notwithstanding the statute, to enable the lessor's assigns to bring covenant or ejectment against the lessee and his assigns for the rent reserved. *Van Rensselaer v. Hays*, 19 N. Y. 68; *Same v. Ball*, *id.* 100; and see *ante*, § 261, and notes.

<sup>1</sup> *Dumpor's Case*, 4 Co. 119, b; *Bleecker v. Smith*, 13 Wend. 530; *Dakin v. Williams*, 17 Wend. 447; s. c. 22 *id.* 201. "The profession have always wondered at *Dumpor's Case*," said Sir. J. Mansfield, in *Doe v. Bliss*, 4 Taunt. 735; "but it has been law so many centuries, that we cannot now reverse it." So, per *Ld. Eldon*, in *Bummel v. Macpherson*, 14 Ves. 173; and *Nelson, J.*, in *Dakin v. Williams*, *supra*. The law has been changed in England by statute 22-23 Vict. c. 35; 23-24 Vict. c. 38; and a first license will only discharge the condition by express words to that effect. *Dumpor's Case* has, however, been recognized and followed in *Lynde v. Hough*, 27 Barb. 415, 422; *Siefke v. Kock*, 31 How. Pr. 383; *McKildoe v. Darracott*, 13 Gratt. 278; *Dougherty v. Matthews*, 35 Mo. 520; *Pennock v. Lyons*, 118 Mass. 92; and see *Gannett v. Albree*, 103 *id.* 372; and *Chipman v. Emeric*, 5 Cal. 49. The doctrine, of course, applies only to negative covenants, for a license is a permission to do a prohibited act, not to omit an affirmative duty. But it makes no difference whether the condition relates to a single or continuous duty. A license for one breach in the manner contemplated by the lease will discharge the whole condition.

required the license to be in writing, a parol license was held to be insufficient to satisfy the condition or otherwise subsequent assignment;<sup>1</sup> and if a license has been used as a snare, or under circumstances which amount to fraud, equity will give relief.<sup>2</sup>

§ 287. **Forfeiture for Breach of, how Waived.** — The forfeiture of a lease by breach of any other condition may be waived, in the same manner as a forfeiture for non-payment of rent, or a notice to quit; for if the landlord subsequently does any act, with knowledge of the breach, which can be considered as an acknowledgment of a tenancy still subsisting, he will be held to have waived the forfeiture; and if the condition imposes a single obligation, and must be taken wholly if at all, the condition itself is discharged by such waiver, as much as by a license.<sup>3</sup> We shall have occasion, however, to treat of this matter more fully, when we come to consider the subject of terminating a lease by forfeiture, and will not, therefore, pursue it any further at present.

§ 288. **Subsequent, Breach of, how Waived.** — In general, where an estate is defeasible on the non-performance of a condition subsequent, it is not absolutely defeated upon the happening of the contingency on which it is defeasible; for the estate will continue afterwards, unless the grantor or his heirs take advantage of the breach of condition by an actual entry, which is generally necessary to revest an estate of freehold,<sup>4</sup> if the grantor is not already in possession.<sup>5</sup> A different rule, however, formerly prevailed with regard to a term of years, and it was considered that on a breach of con-

<sup>1</sup> *Roe v. Harrison*, 2 T. R. 425; *Seers v. Hind*, 1 Ves. 294.

<sup>2</sup> *Richardson v. Evans*, 3 Madd. 218; *Macher v. Found. Hosp.*, 1 Ves. & B. 191; *Roe v. Harrison*, 2 T. R. 425.

<sup>3</sup> 1 Smith's Lead. Cas. 20, a; *Lloyd v. Crispe*, 5 Taunt. 249; *McGlynn v. Moore*, 25 Cal. 384; *Conger v. Duryee*, 90 N. Y. 594. As to what are single, and what continuous conditions, see *post*, §§ 497-501.

<sup>4</sup> *Canal Co. v. Railroad Co.*, 4 Gill & J. 121; *Willard v. Henry*, 2 N. H. 120; *Chalker v. Chalker*, 1 Conn. 79.

<sup>5</sup> *Lincoln Bank v. Drummond*, 5 Mass. 321; *Rollins v. Riley*, 44 N. H. 9.

dition the lease was absolutely determined, and could not be set up again by any act, even on the part of the landlord. But this doctrine is no longer recognized.<sup>1</sup>

§ 289. **Substantial Performance of, Sufficient.**—The substantial performance of a condition is generally sufficient; and its non-performance may be excused when occasioned by the act of the law, or of the other party. In general, also, if a condition becomes impossible by the act of God, the obligation is discharged. As, where the obligee in a condition subsequent died; or a man covenanted to build a house before a certain day, and afterwards the plague came there before that day and continued there until after the day, the condition was in each case held to be dispensed with.<sup>2</sup> So where the law forbids the act conditioned to be performed, performance is excused.<sup>3</sup> The same result follows, where the party accepts another thing in satisfaction,<sup>4</sup> or is himself in default; as where the condition is the payment of a sum of money, and the payee is out of the commonwealth;<sup>5</sup> or the obligation is to build or repair a house, and the obligee hinders or forbids the performance. But where the lessee covenanted to drain the water upon the land before a certain day, and the lessor entered upon the premises before that day, and continued there until the day was past, it was held to be no excuse unless it appeared that the lessor interfered with his operations.<sup>6</sup>

<sup>1</sup> See *post*, §§ 412, 492, and notes.

<sup>2</sup> *Merrill v. Emery*, 10 Pick. 507; 1 Roll. Abr. 450.

<sup>3</sup> *Holland v. Bouldin*, 4 T. B. Monr. 150.

<sup>4</sup> *Brown v. Vandergrift*, 80 Pa. St. 142. Here in a mining-lease a clause of re-entry, if mining ceased for twenty days, was held not abrogated by a clause that a certain named sum shall be paid for every day until mining began. See *Munroe v. Armstrong*, 96 Pa. St. 307.

<sup>5</sup> *Williams v. Bank U. S.*, 2 Pet. 102; *U. S. v. Arredondo*, 6 *id.* 745; *Bradstreet v. Clark*, 21 Pick. 389.

<sup>6</sup> *Carrel v. Read*, Cro. El. 374; *Jackson v. Crafts*, 18 Johns. 110. And where in a mining-lease it was stipulated that the ore was to be worked in a "good and husbandlike" manner, it is no excuse if it cannot be worked at a profit, and a delay to take any ore out for sixteen months will work a forfeiture. *Stockb. Iron Co. v. Cone Iron Works*, 102 Mass. 80.

§ 290. **Clause of Re-entry in Lease.** — In every well-drawn lease it is the invariable practice to insert a clause of re-entry for a breach of its covenants or conditions. This practice is said to have grown out of an ancient process for the recovery of rent by writ of *cessavit*, which in fact amounted to a distress of the whole of the tenant's land, by seizing and holding it until he paid the arrearage of rent. For, by feudal law, after the lord had granted out his lands, he still had the right of seignior, as well as the right to all the other services reserved upon the grant; and in case of a failure in any of them, he might enter upon and take possession of the feud. This proceeding, however, was taken away by the statute of 52 Hen. III., which prohibited a distress of the freehold, except by the king's writ, and left the tenant's chattels, as the only subject for the lord's distress. After which, and as a convenient substitute therefor, the practice was introduced, on granting a lease, of inserting a power of re-entry for the non-payment of rent; which practice gradually extended itself to other covenants and causes of forfeiture besides the non-payment of rent.<sup>1</sup>

§ 291. **Re-entry Clause essential to support Action of Covenant.** — This clause enables the lessor, his heirs or assigns, in case of a breach of condition or covenant, to re-enter upon the demised premises, and eject the tenant, leaving both parties in the same situation as if the lease had never been granted.<sup>2</sup> The grantor and his heirs may still enter, and take advantage

<sup>1</sup> Hargrave's note to Co. Lit. 142, a. The right of re-entry is not a reversionary or other estate in the land, but is a mere right of action, and, if enforced, the grantor of the estate would be in by the forfeiture of the condition, and not by a reverter. At common law, this right of action could not be granted over, and it is only by force of the statute that the assignee of the lessor can now re-enter for condition broken. But the statute did not intend to convert this right into a reversionary estate, as has been sometimes supposed.

<sup>2</sup> Johns v. Wittey, 3 Wils. 127; Doe v. Phillips, 2 Bing. 13. The right to re-enter for non-payment of rent is not incident to the estate of the lessor at common law, but must be reversed by deed; and all the conditions or stipulations annexed thereto must be strictly followed. Smith v. Blaisdell, 17 Vt. 199.

of a breach of *condition*, or other common-law forfeiture, by ejectment, without this clause;<sup>1</sup> but in case of a breach of *covenant*, in the absence of a proviso for re-entry, the lessor would possess no such power; for the mere breach of a covenant enables him to sue for damages only.<sup>2</sup> Any mere covenant without the clause authorizing a re-entry would afford but an indifferent security to the landlord, from the difficulty of ascertaining the actual extent of damage done by a breach of many of the covenants; or the inability of a tenant to pay the pecuniary recompense therefor, after it shall have been recovered in a suit at law. The principle applies also to the case of a tenant, holding under a mere agreement for a lease, which specifies the covenants to be inserted in the lease, and that there shall be a power of re-entry for a breach of them.<sup>3</sup>

§ 292. *Re-entry to be made during the Term.* — But a proviso for re-entry operates only during the term, and cannot be taken advantage of after its expiration. Thus, where a lease of *ninety-nine years if A. and B. should so long live* was granted, with a proviso for re-entry in case the lessee should underlet the premises for the purposes of tillage, and an undertenant of the lessee ploughed up and sowed the land, but the lessor did not enter during the continuance of the estate,—it was held, in an action of trespass by the lessor against the undertenant, for entering upon the land after the determination of the estate, for the purpose of carrying away the emblements, that the plaintiff, having never been in possession by right of

<sup>1</sup> *Wigg v. Wigg*, 1 Atk. 382; *Doe v. Watt*, 1 Mann. & R. 694.

<sup>2</sup> *Pells v. Brown*, Cro. Jac. 590; *Delancy v. Ganong*, *ante*; *Page v. Hayward*, 11 Mod. 61, per Holt, C. J.; *Brown v. Kite*, 2 Overt. 233; *Bockover v. Post*, 1 Dutch. 285; *Fox v. Brissac*, 15 Cal. 223; *Johnson v. Gurley*, 52 Tex. 222. A proviso for re-entry in a lease is to receive a reasonable construction like other contracts, and is not to be construed with the strictness of conditions at law. *Doe v. Elsam*, 1 Mood. & M. 189. A lessee was to incur a forfeiture if he did not do certain repairs to the satisfaction of the surveyor of the lessor. He did the repairs, but the lessor's surveyor was not satisfied. Held, that if the jury thought the surveyor ought to have been satisfied, that would be sufficient, and there would be no forfeiture incurred. *Doe v. Jones*, 2 C. & K. 743.

<sup>3</sup> *Doe v. Breach*, 6 Esp. 106; *Doe v. Watt*, 8 B. & C. 308; *Doe v. Kneller*, 4 C. & P. 3.



re-entry for condition broken, could have no advantage thereof, and that the defendant, who ploughed and sowed the land, was entitled to take the emblements.<sup>1</sup>

§ 293. **Who may reserve Right of Re-entry.** — A power of re-entry, like a condition, can only be reserved to the lessor and his heirs, and not to a stranger, even by express words. As, where a lease was made by a trustee, reserving a right of re-entry upon a breach of covenant to the *cestui que trust*; forasmuch as the legal estate was in the trustee, the reservation was held to be void.<sup>2</sup> So, where a person devised leasehold property to his wife to receive the rents during her lifetime, and the surviving trustee and the widow afterward granted a lease of the premises, rent to be paid to the widow, and the lessors to have a power to re-enter for the non-payment of rent, it was held that, being a stranger to the legal estate, the power of re-entry could not be reserved to the widow, and that the lease operated as a lease by the trustee, with a simple confirmation by her.<sup>3</sup> For a similar reason, this power is not available by the executor of one who has granted land in fee, subject to an annual rent; for, as executor, he could not be vested with the estate. It would be otherwise, however, if the testator held an estate for years in the premises, and had leased them for part of the term; since the residuary estate in that case would belong to the executor.<sup>4</sup> And a power to a particular person to enter will not extend to his executor, unless

<sup>1</sup> *Johns v. Wittey*, 3 Wils. 127. A right of re-entry may be effectually given upon breach of covenants, including a covenant to pay rent, as well as in terms for non-payment of rent; and though a general clause of re-entry can extend only to cases not otherwise specially provided for, yet such a general clause is compatible with a prior clause giving a right of re-entry also after a certain period of default in the rent. *Van Rensselaer v. Jewett*, 2 N. Y. 141.

<sup>2</sup> *King's Chapel v. Pelham*, 9 Mass. 501; *Doe v. Lawrence*, 4 Taunt. 23; *Jackson v. Topping*, 1 Wend. 388.

<sup>3</sup> *Doe v. Goldsmith*, 2 C. & J. 674; and see *Doe v. Adams*, *id.* 232. A proviso for re-entry, if the lessee shall make default in the performance of any other covenants, which on his part are or ought to be performed or kept, applies to and forbids the breach of a negative as well as of a positive covenant. *Croft v. Lumley*, 6 H. L. Ca. 672.

<sup>4</sup> *Van Rensselaer v. Hayes*, 5 Den. 477.



so mentioned.<sup>1</sup> But a residuary devisee may take advantage of such a condition, annexed to a specific devise, if the deviser do not otherwise limit over the contingent interest in the estate thus specifically devised.<sup>2</sup> And so may an assignee of the reversion, as we shall presently see, by force of the statute of Hen. VIII.; yet, as a general rule, when no words of limitation are mentioned, the law will reserve the benefit of the condition to the heirs of the lessor.<sup>3</sup>

§ 294. **Rights of Lessor's Reversioner.**—To enable a reversioner to avail himself of a forfeiture, upon a condition broken, it is necessary, according to the English cases, that he should have the same estate in the lands at the time of the breach that existed when the condition was created; for an extinguishment of the estate in reversion, in respect of which the condition was made, will extinguish the condition also.<sup>4</sup> As, where a lease was made for a hundred years, and the lessee executed an under-lease for twenty years, rendering rent, with a clause of re-entry, and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term, it was held that the grantee should not have either the rent or the power of re-entry; for the reversion of the term to which they were incident was extinguished in

<sup>1</sup> *Hassel v. Gowthwaite*, Willes, 500. A right of re-entry for the non-payment of rent may be reserved upon a conveyance in fee, and is assignable with the rent. *Van Rensselaer v. Ball*, 19 N. Y. 100.

<sup>2</sup> *Hayden v. Stoughton*, 5 Pick. 528; *Brigham v. Shattuck*, 10 *id.* 306; *Clapp v. Stoughton*, *id.* 463; *Austin v. Cambridgeport*, 21 Pick. 215. In New York, the right of a devisee to take advantage of a condition reserved in a grant in fee by his deviser seems established both by statute and by common law. See cases cited, *post*, § 295, note; but the courts do not limit the doctrine to devisees, but apply it to all assignees. In *McKissick v. Pickle*, 16 Pa. St. 140, the court seem to consider the old law restricting the reservation of conditions to, and enforcement of them by, the grantor's heirs alone, to be obsolete, and that an assignee may take advantage of any condition so reserved. Neither the executor nor a devisee of one who has granted land in fee subject to rent, can maintain ejectment for rent in arrear which became payable in the lifetime of the testator, but only for such as accrued since the will took effect in his favor. *Van Rensselaer v. Hayes*, *supra*.

<sup>3</sup> Co. Lit. 214, a; 3 Atk. 134.

<sup>4</sup> *Dumpor's Case*, 4 Co. 119, b.

the reversion in fee.<sup>1</sup> It is not, however, necessary that the party claiming should have an actual reversion, remaining in the land after the grant; for if a lessee for years assign his whole term to another upon condition, he may still re-enter for breach of the condition, though he may have parted with his whole term.<sup>2</sup> Yet a third person cannot enter, unless he comes in under the lessor; therefore, if a lessee for twenty years make a lease for ten on condition, and then surrender to him in reversion, the reversioner, being in of a paramount estate, cannot take advantage of the condition.<sup>3</sup>

§ 295. **Of Lessor's Assignee or Grantee.**—At common law, an assignee or grantee of a reversion, although he might have an action for rent reserved, could not enter for a condition broken; for, to prevent maintenance, an assignment of a mere right of entry was not allowed. The statute 32 Hen. VIII. c. 34, first provided that *assignees* or *grantees* of a reversion should be entitled to all such advantages as the lessors or grantors themselves had, by entry for non-payment of rent, or other forfeiture.<sup>4</sup> This statute has been generally re-enacted in the United States.<sup>5</sup> It has been held in New

<sup>1</sup> *Theirr v. Barton*, Moore, 94; *Webb v. Russell*, 3 T. R. 393; Co. Lit. 215, b.

<sup>2</sup> *Doe v. Bateman*, 2 B. & A. 168. This case was affirmed in *Colville v. Hall*, 14 Ir. C. L. 265; and see *post*, § 295, and note.

<sup>3</sup> *Chaworth v. Phillips*, Moore, 876.

<sup>4</sup> But the condition must relate to the land demised. Co. Lit. 215, b; Comyn L. & T. 286; *Stockb. Iron Co. v. Cone Iron Works*, 102 Mass. 80, 84. Hence a condition of re-entry for any breach of the game laws will not pass. *Stevens v. Copp*, L. R. 4 Exch. 20. The provision applies as against lessees holding over. *Smith v. Kaiser*, 17 Neb. 184.

<sup>5</sup> But not in Ohio. *Crawford v. Chapman*, 17 Ohio, 449. By N. Y. R. S. 748, §§ 23, 25; Laws of 1805, c. 98, it is enacted that "the grantees of any demised lands, tenements, rents, or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee, or assignee, shall have the same remedies by *entry*, action, distress, or otherwise, for the non-performance of any agreement contained in the lease so assigned, &c., as their grantor or lessor had, or might have had, if such reversion had remained in such lessor or grantor. The provisions of this section extend as well to grants or leases in fee reserving rent as to leases for life and for years."

York, in construction of the statute cited below, that the grantee of a rent reserved in fee was entitled to all the remedies which his grantor had before he parted with the reversion; that a right of re-entry for the non-payment of rent may be reserved upon such a conveyance; and that such a right is not confined to the grantor and his heirs, but is assignable, with the rent, by force of the statute.<sup>1</sup>

§ 296. **Of Assignee of Part of the Reversion.**—But an assignee of part of the reversion is not within the statute; as, if a lease be made of three acres of land, with a condition for re-entry, the assignee of the reversion of two acres cannot enter for a breach of the condition; for the condition, being entire, cannot be apportioned by the act of the parties, but will be destroyed.<sup>2</sup> On the other hand, where the landlord re-enters, he is in of his old estate in the same plight in which it was when he parted with it, and therefore all charges and incumbrances or alienations made by the tenant since the condition was created are avoided at the same time.<sup>3</sup> Yet, although

<sup>1</sup> *Van Rensselaer v. Hays*, 19 N. Y. 68; *Van Rensselaer v. Ball*, *id.* 100. It was also declared in these cases that the assignee of a lessor in fee might have covenant and ejectment at common law, although having no reversion, since the privity which this conferred was replaced by the privity flowing from the rent as an incorporeal hereditament. The statute 1805, c. 98, was repealed by statute 1860, c. 396; but the same right of action was held to exist under the statute of 1846, c. 274: *Van Rensselaer v. Slingerland*, 26 N. Y. 580; and at common law: *Same v. Dennison*, 35 *id.* 393, where the operation of the statute of 1787 was declared to be restricted to covenants in law; and so see *Tyler v. Heidorn*, 46 Barb. 439. The actions in all these cases were by devisees, to whom such conditions were held to pass by *Hayden v. Stoughton*, 5 Pick. 528. See *ante*, § 293, n.; but the courts do not distinguish between these and any class of assignees, nor on principle can any distinction be made at law between them; or between the grantee of a rent charge, and the grantee of a lessor in fee reserving rent. In *Van Rensselaer v. Barringer*, 39 N. Y. 9, *Hosford v. Ballard*, *id.* 147, the law is declared settled beyond question.

<sup>2</sup> Co. Lit. 215, a; *Dumpor's Case*, 4 Co. 119, b; *Knight's Case*, 5 *id.* 55, b; *Lee v. Arnold*, 4 Leon. 27.

<sup>3</sup> *Shep. Touch.* 121. In *Eyton v. Jones*, 21 L. T. n. s. 781, there was a clause of forfeiture for assigning, except as to three acres. The tenant having aliened the three acres assigned by license the remainder, — since

the assignee of the reversion of part of the land cannot enter for a condition broken, he may maintain an action of covenant by virtue of the statute.<sup>1</sup>

§ 297. **Demand for Rent to precede Re-entry.** — Where a landlord has a right of re-entry for non-payment of rent, a demand of the rent, either upon or after the last day which the lessee has to pay, is still essential to complete the forfeiture, and enable him to maintain an action; for it is not until after demand and non-payment that this condition is broken.<sup>2</sup> But there may, by the special agreement of parties, be a re-entry for default in the payment of rent, without a demand of it.<sup>3</sup> In such case, the mere failure to pay, with or without demand, constitutes the breach which works a forfeiture, and a subsequent entry at any time is good.<sup>4</sup> So, if the tenant disclaims holding under the landlord, or refuses to pay rent on that ground, the lessor is entitled to re-enter without any previous demand of rent.<sup>5</sup> An actual demand is, in general, necessary to complete the breach, whether the proviso gives the right of re-entry in case the rent be behind for a certain period of time after the day whereon it falls due, or the lease is declared to be absolutely void in case of its non-payment.<sup>6</sup> Accordingly, where the condition was that, if the rent were suffered to remain due and unpaid, *the indenture and the*

the statute 22-23, 23-24, Vict., — and his assignee assigned the whole without license. It was held that the whole was re-vested in the lessor by his entry.

<sup>1</sup> Twynam v. Pickard, 2 B. & A. 105.

<sup>2</sup> Doe v. Wandlass, 7 T. R. 117. See Nowell v. Wentworth, 58 N. H. 319. We have elsewhere, *post*, § 493, seen the strict requisites of the demand, when the landlord proceeds to enforce a forfeiture under the common law, and independent of the statute.

<sup>3</sup> Dormer's Case, 5 Co. 39. So, Fifty Associates v. Howland, 5 Cush. 214, where stipulation that lessor might enter without further demand was held to mean without any demand.

<sup>4</sup> Sweeny v. Garrett, 2 Disney, 601; Goodright v. Cator, 2 Dougl. 478; Doe v. Masters, 2 B. & C. 490.

<sup>5</sup> Jackson v. Collins, 11 Johns. 1; Salem Presb. Cong. v. Williams, 9 Wend. 147.

<sup>6</sup> Co. Lit. 202, a; Clun's Case, 10 Co. 129; Doe v. Wandlass, *supra*; Bowyer v. Seymour, 13 W. Va. 12.

*estate thereby created should be void*, it was held that the grantor was not entitled to recover as for a condition broken, without showing a formal demand of the precise sum due, at a convenient time before sundown of the day on which the rent became payable by the reservation.<sup>1</sup>

§ 298. **Where Re-entry not Necessary. — Demand always Necessary.**— Wherever the action of ejectment is in force, no actual entry by the landlord is necessary to enable him to take advantage of a condition broken, because the constructive entry implied and confessed in the action is sufficient for the purpose, even where the estate to be avoided is one of freehold.<sup>2</sup> And where the grantor is already in possession, while no entry by him is required,<sup>3</sup> yet he must manifest his intention to avail himself of the forfeiture by some distinct act.<sup>4</sup> But the necessity of proving a strict common-law demand, both as to time and place, still remains, wherever a forfeiture for the non-payment of rent is to be established, unless when dispensed with by agreement of the parties or by statute.<sup>5</sup> Thus, for instance, where, under a proviso for

<sup>1</sup> *Jackson v. Kipp*, 3 Wend. 230.

<sup>2</sup> *Doe v. Masters*, *supra*; *Little v. Heaton*, 2 Ld. Ray. 750; *Bear v. Whistler*, 7 Watts, 149; *Jackson v. Crysler*, 1 Johns. Cas. 125; *Doe v. Alexander*, 2 M. & S. 525; *Garrett v. Scouten*, 3 Den. 334. In Michigan, absolute notice to quit and demand of possession are held to constitute a sufficient re-entry. *Alexander v. Hodges*, 41 Mich. 691.

<sup>3</sup> *Ante*, § 288.

<sup>4</sup> *Hubbard v. Hubbard*, 97 Mass. 188; *Stockb. Iron Co. v. Cone Iron Works*, 102 *id.* 80. In *Allen v. Brown*, 5 Lans 280, it is held that a landlord cannot accept a surrender of a lease for life where waste has been committed, so as to divest lessee's mortgage. In the course of the decision the court lay down the general rule that a lessor for life cannot divest by mere entry, but must bring ejectment; though otherwise in a lease for years. *Ebsworth v. Jackson*, 20 Johns. 180, is relied upon. But there it was only held that a general entry by the lessor would not be presumed by the court to be for forfeiture. In the principal case the condition was against waste, and the fact of waste should perhaps be first judicially settled; but this is aside from the point discussed. The doctrine of the court has no support in English law, and is not borne out by any case cited.

<sup>5</sup> *McCormick v. Connell*, 6 S. & R. 151; *Van Rensselaer v. Jewett*, 2 N. Y. 147.

re-entry, in case of the non-payment of rent for twenty-one days after it was due, it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the twenty-first day, at one o'clock, — it was held that only one quarter's rent should have been demanded, and that the demand must have been made at sunset, if the lessor intended to insist upon the forfeiture.<sup>1</sup>

§ 299. **Re-entry under the English Statute.** — So, under the English statute 4 Geo. II. c. 28, where there is a proviso for re-entry, if no sufficient distress is found upon the premises at the expiration of fourteen days from the rent-day, the landlord is *prima facie* entitled to recover after proof of there being no distress on the premises some day after the fourteen, though that day should be subsequent to the demise in the ejectment.<sup>2</sup> This clause of the statute must be strictly pursued, and it is necessary that every part of the premises be searched, in order to ascertain that no sufficient distress can be found thereon.<sup>3</sup> But a lessor can in no case bring an ejectment upon the clause of re-entry, after distraining for rent in arrear, — such a proceeding being considered a waiver of the forfeiture.<sup>4</sup>

§ 300. **Demand dispensed with by Statute.** — The formalities of a common-law demand to enforce a condition for the payment of rent are dispensed with by statute in many of the United States, following the provisions of the statute 4 Geo. II. c. 28, and an action of ejectment substituted, — the right thereto depending on the question whether a sufficient distress is or not found on the premises.<sup>5</sup> In place of the formal action of ejectment, which the English and some of the older statutes gave, a summary remedy is in many States provided, whereby recovery of the premises may be had.<sup>6</sup>

§ 301. **In New York.** — The New York statute does not extend to cases where the lease contains no clause of re-

<sup>1</sup> Doe v. Paul, 3 C. & P. 613.

<sup>2</sup> Doe v. Fuchau, 15 East, 286.

<sup>3</sup> Rees v. King, Forrest, 19.

<sup>4</sup> Norton v. Sheldon, 5 Cow. 448.

<sup>5</sup> 2 N. Y. R. S. 505, § 30. And see *post*, §§ 301, 492, 493.

<sup>6</sup> *Id.*

entry,<sup>1</sup> nor where there is a sufficient distress upon the premises; and, consequently, in such cases the lessor can only proceed at common law, as before the statute.<sup>2</sup> The distress, however, must be such that the landlord could have availed himself of it; and, therefore, where the tenant locked up the premises, so that his goods, supposing there was sufficient there for the purpose, could not be distrained without rendering the landlord a trespasser, it was held that proof of this fact was sufficient to satisfy the statute, which meant no sufficient distress upon the premises which could be got at.<sup>3</sup> When proceeding under that statute, also, he was bound to show a compliance with all the requirements of the common law, before he could avail himself of a condition of re-entry.<sup>4</sup> And under the English statute, it has been held that this provision has not done away with the necessity of a demand of rent, if the lease requires it, although such a demand need not be made with all the particularity required at common law.<sup>5</sup>

§ 302. **Re-entry on Notice in New York.**— But a recent statute of New York, which abolishes distress for rent, now authorizes a re-entry for the non-payment of rent, whether there are sufficient goods on the premises or not, in all cases where the right of re-entry has been reserved in the lease, provided that fifteen days' notice of an intention to re-enter be given to the lessee, or be left at his dwelling-house.<sup>6</sup> This

<sup>1</sup> *Jackson v. Hogeboom*, 11 Johns. 163. No right to re-enter unless reserved in the lease. *Den v. Post*, 1 Dutch. 286.

<sup>2</sup> *Doe v. Wandlass*, 7 T. R. 117; *Doe v. Roe*, 9 Dowl. 548; *Farley v. Craig*, 3 Green, 192. If plaintiff enters by virtue of a clause of re-entry, he must show himself entitled to do so by the terms of his contract; he must also show the absence of a sufficient distress on the premises, or excuse himself from the necessity of attempting a distress. Per Hornblower, C. J.

<sup>3</sup> *Doe v. Dyson*, Mood. & M. 77.

<sup>4</sup> *Jackson v. Kipp*, 3 Wend. 230; *Jackson v. Wykoff*, 5 Wend. 53; *Coon v. Brickett*, 2 N. H. 163; *Hamilton v. Elliott*, 5 S. & R. 375; *Gray v. Blanchard*, 8 Pick. 284.

<sup>5</sup> *Doe v. Shawcross*, 3 B. & C. 752.

<sup>6</sup> Laws of 1846, c. 369. The constitutionality of this law was sustained in *Van Rensselaer v. Snyder*, 13 N. Y. 299.



right of re-entry on fifteen days' notice is cumulative upon the former one, which requires the landlord to prove the absence of a sufficient distress; and both may subsist together, and the landlord may elect between them.<sup>1</sup>

§ 303. **Summary Process provided for.**—Instead of, and in some cases in addition to, the formal action of ejectment, the statutes of most of the United States have provided that the lessor may enforce his right to the premises by a summary proceeding in some cases after ten, in others after fourteen or more, days' notice and demand. But as substantially the same form of proceeding exists whether the ground of removal be a forfeiture by breach of condition in the demise, or a statutory dispossession for non-payment of rent, or because the tenant holds over his term, or forcibly detains the premises, we have considered the features of this process under the head of remedies later in this volume and refer the reader there for the law in detail.<sup>2</sup>

<sup>1</sup> *Williams v. Potter*, 2 Barb. 816. Though the common-law mode of re-entry is not taken away by this statute, an entry pursuant to its provision does not require the formalities, as to demand, of a common-law entry. *Van Rensselaer v. Snyder*, *supra*.

<sup>2</sup> *Post*, §§ 493, 494, 718, 728, notes and cases cited.

## CHAPTER VIII.

## COVENANTS ON THE PART OF THE LESSOR.

## SECTION I.

## THE COVENANT FOR QUIET ENJOYMENT.

§ 304. **Defined. — What it implies. — Runs with the land. —** The principal covenant on the part of a landlord is that his tenant shall have *the quiet enjoyment and possession of the premises* during the continuance of the term. The law supposes that when a man makes a lease, he has a good title to the land, and, consequently, power to lease it; and an engagement to this effect on the part of a lessor is therefore always implied. It is also to be understood, as a condition of his right to demand rent, that the lessee shall not be disturbed in his possession of the demised premises during the term, by the lessor or by any other person rightfully claiming under him.<sup>1</sup> But although this covenant is always implied on the part of a lessor in every case of a tenancy for a fixed period, however short it may be,<sup>2</sup> it is still usual to insert,

<sup>1</sup> Mack v. Patchin, 42 N. Y. 167; Sigmund v. Howard Bk. of Balt., 29 Md. 324; Holder v. Taylor, Hob. 12; Ludwell v. Newman, 6 T. R. 458; Baugher v. Wilkins, 16 Md. 35; and see Burwell v. Jackson, 9 N. Y. 535; Owens v. Wright, 5 McCrary, 642; Field v. Herrick, 10 Bradw. (Ill.) 591. It is held that the implied covenant for quiet enjoyment may be modified or restrained by express covenants inconsistent therewith. O'Connor v. Memphis, 7 Lea, 219. And where the lessee receives and holds possession of part only of the premises, it may become a question of fact whether or not he has waived the full performance of the lessor's covenant. Prior v. Kiso, 81 Mo. 249. See *ante*, § 252, and notes.

<sup>2</sup> Per Parke, B., in Hart v. Windsor, 12 M. & W. 85, on the part of a lessor. Want of title may amount to a fraudulent representation, and

among other provisions of the lease, an express covenant for the lessee's quiet enjoyment, and to save him harmless from all persons claiming title, upon his performance of those stipulations which are obligatory upon him.<sup>1</sup> This is a covenant running with the land, and obligatory upon every person who becomes legally possessed of the land.<sup>2</sup>

§ 305. *What it intends.* — This covenant, whether expressed or implied, means *that the tenant shall not be evicted* or disturbed by the lessor or by persons deriving title from him, or by virtue of a title paramount to his, and implies no warranty against the acts of strangers.<sup>3</sup> It is equivalent to a

when accompanied with damage will constitute a good cause of action, irrespective of this covenant. *Whitney v. Allaire*, 4 Den. 554; s. c. 1 N. Y. 305. So *Milliken v. Thorndike*, 103 Mass. 382. In this case, the defendant was induced to hire a wharf from the plaintiff by fraudulent representations that the right mentioned in the lease embraced a parcel of land which in fact belonged to the corporation of New York. It was held, in an action for rent, that he was entitled to a deduction of the sum which he was obliged in good faith to pay for a lease of that lot. The fact that the demise was not of the wharf, but of plaintiff's right to the wharf, made no difference. The question in such cases is, not what passed by the conveyance, but what would have passed had the representations been true.

<sup>1</sup> The Supreme Court of New York, in the case of *Kinney v. Watts*, 14 Wend. 38, held that, under the statutes of that State, no covenant for quiet enjoyment could be implied in a lease, or other conveyance of terms for years where the term exceeded three years; but the Court of Appeals overruled this case, in *Mayor v. Mabie*, 13 N. Y. 151, and held that such an instrument is not a conveyance of real estate, within the meaning of the statute (1 R. S. 738, § 140) forbidding the implication of covenants in deeds. And see *Vernam v. Smith*, 15 N. Y. 332. But a lease in perpetuity, or in fee reserving rent, is a conveyance of real estate, within the provisions of the statute in regard to the implication of covenants, and if it contains no covenant for quiet enjoyment, none will be implied. *Carter v. Burr*, 39 Barb. 59.

<sup>2</sup> *Shelton v. Codman*, 8 Cush. 318.

<sup>3</sup> *King v. Reynolds*, 67 Ala. 229. So the landlord is not liable for trespasses committed by another tenant. *Abrams v. Wilson*, 59 *id.* 524. So a lessee cannot have his lease cancelled or be released from the covenant to pay rent merely because a prior tenant whose term has expired holds over without right. *Field v. Herrick*, 101 Ill. 110; *McNairy v. Hicks*, 8 Baxt. 378. And it is held that the renting of premises to a

stipulation that the lessee shall not be rightfully disturbed in his possession during the term, not that he shall not be disturbed at all. And all that it requires is, that the lessor shall have such a title at the time of the demise, as shall enable him to make a good unincumbered lease for the term demised.<sup>1</sup> But any interference with the possession of the lessee by the lessor, more than a trespass, will amount to a breach of the covenant, in whatever form it may happen.<sup>2</sup> If the lessor merely covenants against the acts of a particular person, his general obligation is restricted, and a molestation by that person only, can be the ground of a breach of the covenant.<sup>3</sup> If it is contained in a lease for life, the lessor is bound, under the general covenant, to make it good against all men; but if it be a lease for years, then only as against

tenant who carries on therein a trade, which renders inconvenient the occupation of an adjoining tenant of the same landlord, does not amount to an eviction of the latter tenant. *Gray v. Graff*, 8 Mo. App. 329. See § 316, *post*. Where premises are leased subject to certain uses in an adjoining tenant under the same landlord, as where adjoining farms are drained by a common artificial drain running under both, the landlord will be liable for a breach of the covenant for quiet enjoyment, if in the ordinary use of his right by the other tenant the lessee's enjoyment is disturbed by reason of the fault of the landlord; as where such a drain had been imperfectly and improperly constructed by the landlord. But if the disturbance arises from the adjoining tenant's fault, as by excessive and improper use of the drain, the landlord is not liable. *Sanderson v. Mayor of Berwick*, 13 Q. B. D. 547.

<sup>1</sup> *Gardner v. Keteltas*, 3 Hill, 330; *Knapp v. Marlboro'*, 34 Vt. 285; *Grist v. Hodges*, 3 Dev. 388; *Underwood v. Birchard*, 47 Vt. 305.

<sup>2</sup> *Mayor v. Mabie*, *supra*; *Fuller v. Ruby*, 10 Gray, 258; *Lounsberry v. Snyder*, 31 N. Y. 514. Any interference with the person of a tenant by the landlord, although on the demised premises, is a trespass, and not an eviction. *Vatel v. Herner*, 1 Hilt. 149; *id.* 285. A covenant of seisin which resembles a lessor's implied covenant for title extends to the whole of the premises granted, and includes everything which is parcel of the realty, and which would pass by the deed if it belonged to the grantor; and, in such case, if a fence on the premises does not belong to him, the covenant is broken. *Mott v. Palmer*, 1 N. Y. 564.

<sup>3</sup> *Gardner v. Keteltas*, *supra*; *Howell v. Richards*, 11 East, 642. Where a lease contains a covenant for quiet enjoyment, without molestation or disturbance from the lessor, his successors or assigns, no other or further covenant in respect to enjoyment will be implied. *Burr v. Stenton*, 42 N. Y. 462.

all persons claiming through himself, or those from whom he claims title. But if the tenant is ousted by one who has no title, or in the language of the law, by a stranger, it is a trespass for which the law leaves him to his remedy against the wrong-doer, since it arises from no fault of the landlord.<sup>1</sup>

§ 306. **Broken only by Disturbance or Withholding of Possession.** — While the covenant which is implied from the words “demise,” &c., extends to title, and so may be broken wherever a covenant for seisin, or right to convey, or even a covenant against incumbrances would be broken;<sup>2</sup> the covenant for quiet enjoyment, arising from the same words, like the express covenant to the same effect, extends to possession alone, and is broken only by an entry, expulsion, or actual disturbance of possession by the lessor, or one holding a paramount title, or by the lessor’s withholding possession.<sup>3</sup> Thus where the breach assigned was, that the plaintiff was evicted in consequence of a judgment in ejectment by one Yates, who had lawful title to the premises; it was held a good objection, on demurrer, that it did not appear that Yates’s title commenced by any act of the defendant, prior to the assignment made by them to the plaintiff, who might therefore, have been evicted by means of some act done by himself, since the

<sup>1</sup> *Iggulden v. May*, 9 Ves. 330; *Noble v. King*, 1 H. Bl. 34; *Noke’s Case*, 4 Co. 80, b; *Lloyd v. Tomkies*, 1 T. R. 671; *Dudley v. Folliott*, 3 *id.* 584; *Andrews’s Case*, Cro. El. 214; *Greenby v. Wilcocks*, 2 Johns. 1; *Ellis v. Welch*, 6 Mass. 246; *Kimball v. Grand Lodge of Masons*, 131 Mass. 59; *Schilling v. Holmes*, 22 Cal. 327; *Moore v. Weber*, 71 Pa. St. 429; *Schuylkill Co. v. Schmoele*, 57 *id.* 271.

<sup>2</sup> *Miller v. Thornton*, 1 Duv. 369; *Mostyn v. W. M. Coal Co.*, 1 L. R. C. P. Div. 145. Here the landlord’s title failing as to part, the tenant was allowed to rescind or elect to retain the part to which the landlord had title. The covenant of seisin is not broken where the grantor making it has had exclusive occupation by his tenant, under a claim of title for thirty-one years next preceding the covenant. *Ginn v. Hancock*, 31 Me. 42. A seisin in fact is sufficient. *Marston v. Hobbs*, 2 Mass. 489; *Griffin v. Fairbrother*, 10 Me. 95.

<sup>3</sup> *Whitbeck v. Cook*, 15 Johns. 483; *Webb v. Alexander*, 7 Wend. 281; *Mattoon v. Monroe*, 20 Hun, 75; *Boreel v. Lawton*, 90 N. Y. 293; *Boothby v. Hathaway*, 20 Me. 251; *Howard v. Doolittle*, 3 Duer, 464.

assignment.<sup>1</sup> The intendment that the title of the party evicting was derived from the plaintiff may be precluded by averring that the person evicting entered by lawful title, which accrued to him before the date of the conveyance to the plaintiff,<sup>2</sup> or that the party evicting entered by virtue of a title theretofore made by, from, and under the defendant.<sup>3</sup>

§ 307. **Certain words of, construed.** — A covenant for quiet enjoyment against “*any interruption of, from, or by the grantor or his heirs*, or any person whomsoever, legally or equitably claiming, or to claim, any estate, &c., in the premises, by, from, under, or in trust for him or them, or by, through, or with his or their acts, means, *default*, privity, or consent,” was adjudged to extend to an area of quit-rent, due at the time of the conveyance, although it was not shown that the rent accrued during the time the grantor held the estate.<sup>4</sup> The lessor’s indemnity usually extends to the acts of *himself and his heirs and all others claiming under him*;<sup>5</sup> but as to the persons who are construed to come within the meaning of the phrase *all persons claiming under him*, it has been decided that a person taking under an execution of a power of appointment is within the terms of a covenant for quiet enjoyment without any let, suit, &c., of the appointer, his heirs or assigns, or any person or persons claiming, or to claim by, from, or under him; although the estate proceeded from the wife of the appointer, and he and she both joined in exercising the power.<sup>6</sup> This covenant runs with the land, and is, therefore, binding on the assignees of the reversion; and may be made available by the assignees of the term.<sup>7</sup>

<sup>1</sup> Noble v. King, 1 H. Bl. 34; Baugher v. Williams, 16 Md. 35.

<sup>2</sup> Buckley v. Williams, 3 Lev. 325.

<sup>3</sup> Hodgson v. E. Ind. Co., 8 T. R. 278.

<sup>4</sup> Howes v. Brushfield, 3 East, 491.

<sup>5</sup> And where this is the case he is not liable for a disturbance by the paramount title. Dennett v. Atherton, L. R. 7 Q. B. 316. On the same principle, where the tenant has notice of a restriction in the lease, the exercise of it is no breach of this covenant. O’Connor v. Daily, 109 Mass. 235.

<sup>6</sup> Hurd v. Fletcher, 1 Doug. 43; Evans v. Vaughan, 4 B. & C. 261.

<sup>7</sup> Campbell v. Lewis, 3 B. & A. 392; s. c. 8 Taunt. 715. See *ante*, § 202, and notes. The implied covenant for title in the words “*demise*,”

§ 308. **Guarantees Possession, and not Title.** — The express covenant of quiet enjoyment goes to possession, and not to title, and is broken only by an entry and expulsion, or by some actual disturbance in the possession.<sup>1</sup> An outstanding judgment against the lessor, or a lease by him to another under which no entry or attempt at entry is made, or the mere existence of a mortgage on the property before foreclosure and sale is not therefore in either case to be deemed a breach of this covenant.<sup>2</sup> But although a lawful eviction in some form must be shown, it need not be an eviction by process of law;<sup>3</sup> it is enough that, on a valid claim being made by a third person, the plaintiff voluntarily yielded up the possession. If, however, he surrenders the possession without a legal contest, he assumes the burden of proving that the person entering had title paramount.<sup>4</sup> The eviction must also appear to have taken place before suit brought.

§ 309. **Breach of, Effect of certain Acts to create.** — The mere act of forbidding a tenant to pay rent to the plaintiff,

&c., does not run, but like the covenants for seisin, &c., which it resembles, is broken when made. See *ante*, § 263, and notes.

<sup>1</sup> Thus it was formerly laid down that actual ouster, or physical dispossession was necessary: *Waldron v. McCarty*, 3 Johns. 471; *Kortz v. Carpenter*, 5 *id.* 120; *Webb v. Alexander*, 7 Wend. 281; *Kerr v. Shaw*, 13 Johns. 236; and this is, perhaps, still law in New York. *St. John v. Palmer*, 5 Hill, 599; but see *Moffatt v. Strong*, 9 Bosw. 57. The prevailing doctrine, however, now is, that after a demand or other hostile assertion of the paramount title the lessee may yield thereto, taking the risk of its being the superior title, and his attornment or purchase, without any actual change of possession, will be a constructive eviction and breach of the covenant of quiet enjoyment. *Grist v. Hodges*, 3 Dev. 200; *Sprague v. Baker*, 17 Mass. 586; *Loomis v. Bedel*, 11 N. H. 74; *Moore v. Vail*, 17 Ill. 190; *Curtis v. Deering*, 12 Me. 501; *Univ. Vt. v. Joslyn*, 21 Vt. 52; *Brown v. Dickerson*, 12 Pa. St. 372; *Holbrook v. Young*, 108 Mass. 83. But such attornment must be shown. *Hawes v. Shaw*, 100 Mass. 187.

<sup>2</sup> *Sedgwick v. Hallenback*, 7 Johns. 376; *Mills v. Sampsel*, 53 Mo. 360; *Stanard v. Eldridge*, 16 Johns. 254; *Clark v. Lineberger*, 44 Ind. 223.

<sup>3</sup> *Parker v. Dunn*, 2 Jones (N. C.), 203.

<sup>4</sup> *Greenvault v. Davis*, 4 Hill, 643; *Cowan v. Silliman*, 4 Dev. 46; *Hamilton v. Cutts*, 4 Mass. 349; *Booth v. Starr*, 5 Day, 282; *Camarillo v. Folsom*, 49 Cal. 202; *Dunklee v. Koper*, 44 Ga. 266.



unaccompanied by any other disturbance, will not amount to a breach.<sup>1</sup> Nor can a lease by the riparian owner of a batture between the public road and a river, be annulled by a lessee who has not been disturbed, on the ground that the premises are part of the river bank, the use of which is free and not susceptible of being leased.<sup>2</sup> Under this covenant the landlord is not bound to rebuild a house in case of its destruction by fire; nor does such an event amount to an eviction. But it has been held to be so if the landlord has expressly agreed to rebuild or keep the premises in repair and neglects to do so.<sup>3</sup> Nor will any acts of molestation, even if committed by the landlord himself or by a servant at his command, occasion a breach of the covenant, unless they are more than a mere trespass.<sup>4</sup> This covenant is intended to insure to the lessee,

<sup>1</sup> *Witchcot v. Nine*, 1 Brownl. & G. 81. Nor where the lessor had prevented parties from hiring of the lessee. *Ogilvie v. Hull*, 5 Hill, 52. Nor by a demand of possession by one having title. *Cowan v. Silliman*, 4 Dev. 46. But where the lessor had also denied lessee's title, and brought suit against him and his sub-lessees to dispossess them, this was held a breach. *Levitzky v. Canning*, 33 Cal. 299. And in *Leadbeater v. Roth*, 25 Ill. 587, mere prohibition was held an eviction.

<sup>2</sup> *N. O. Carrolton Co. v. Winthrop*, 5 La. Ann. 36.

<sup>3</sup> *Brown v. Quilter*, Ambler, 619; *Myers v. Burns*, 33 Barb. 401; *Womack v. McQuarry*, 28 Ind. 103. But see *Leavitt v. Fletcher*, 10 Allen, 119, where lessor's non-performance of his covenant to repair was held no bar to his suit for rent after the destruction of the premises; and see *post*, §§ 329, 330, 375, and notes.

<sup>4</sup> *Bennett v. Bittle*, 4 Rawle, 339; *Hayner v. Smith*, 63 Ill. 430; *Dimmock v. Daly*, 9 Mo. App. 354; though acts of trespass may rise to an eviction; citing *Upton v. Townend*, 17 C. B. 30. In *Ogilvie v. Hull*, 5 Hill, 54, Chief Justice Nelson says: "No principle is better settled, or more uniformly adhered to than that there must be an entry, and expulsion of the tenant by the landlord, or some deliberate disturbance of the possession, depriving the tenant of the beneficial enjoyment of the demised premises, to operate a suspension or extinguishment of rent. But to constitute a breach of the covenant it is sufficient that the lessee's ordinary and lawful enjoyment be substantially interfered with by acts of the lessor or those claiming under him, though neither the title to, nor possession of, the land be otherwise affected. *Sanderson v. Mayor of Berwick*, 13 Q. B. D. 547." Thus where one let a stall in a market and afterwards discontinued the use of the building as a market, induced the other tenants to surrender their stalls, extinguished the lights of the market except those at the tenant's stand, and closed the doors except the one

legal right to enter and enjoy the premises, and if he is prevented from entering by a person already in, under a paramount title, an action lies.<sup>1</sup> In such case, no ouster or expulsion is necessary, on which to predicate a suit, as the lessee is not bound to enter, and commit a trespass;<sup>2</sup> it must, however, be shown expressly that he was kept out by a title existing in a third person at or before the execution of the lease.<sup>3</sup>

§ 310. **To constitute Breach, Eviction must be by lawful Title.** — The eviction must also be by title both lawful and paramount; accordingly, where the eviction was by a subordinate title, which the grantee had however precluded himself from contesting by his own acts and declarations, it was held, he could not maintain an action on this covenant.<sup>4</sup> And where a third person recovered in an action of trespass against the grantee, it was held that the grantor was not liable on this covenant, unless it was shown that before and at the date of the covenant he had lawful title, and by virtue thereof entered and ousted the plaintiff.<sup>5</sup> But if a lessee, to prevent

in front of such stand, it was held that this was an eviction. *Denison v. Ford*, 7 Daly, 384. But where on tenant's abandoning, the landlord receives the key from a third party, repairs, and puts up "to let" on the premises, this is no eviction. *Pier v. Carr*, 69 Pa. St. 326; *Oastler v. Henderson*, 2 L. R. Q. B. Div. 575.

<sup>1</sup> *Ludwell v. Newman*, 6 T. R. 458; *St. John v. Palmer*, 5 Hill, 599; *Williams v. Weatherbee*, 2 Aik. 329; *Hamilton v. Cutts*, 4 Mass. 349.

<sup>2</sup> 1 Saund. 322; *Grannis v. Clark*, 8 Cow. 36.

<sup>3</sup> *Beddoe v. Wadsworth*, 21 Wend. 120. In the case of *Giles v. Dugro*, 1 Duer, 331, the defendant in the assignment of a lease to the plaintiff covenanted that the assigned premises were free and clear of all incumbrances whatsoever; but it appeared that, prior to the assignment, he had sold and assigned to one Sloan the privilege of using the wall on the premises as a party-wall of a building to be erected during the unexpired term of the lease. It was held that such prior assignment was not a mere license, but was an absolute grant, creating a permanent incumbrance, and, therefore, a breach of the defendant's covenant. And also that, Sloan having actually used the wall as the party-wall of a building he had erected, it amounted to an eviction of the plaintiff, and entitled him to more than mere nominal damages.

<sup>4</sup> *Kelly v. Dutch Ch. of Schenectady*, 2 Hill, 105; *Hoppes v. Cheek*, 21 Ark. 585.

<sup>5</sup> *Webb v. Alexander*, 7 Wend. 281; *Lansing v. Van Alstyne*, 2 Wend.

a violent expulsion from the premises, without waiting for the judgment of the court yields possession, and attorns in good faith to one who has a title paramount and an immediate right of possession, it is equivalent to an ouster, and forms a good defence to the lessor's action for rent.<sup>1</sup>

§ 311. **Actual Ouster necessary to constitute Breach.** — A mere recovery in ejectment against the covenantee is not a breach of this covenant, unless there be an actual ouster by writ of possession.<sup>2</sup> But a decree in equity, directing a defendant to execute a deed and deliver possession of the land, is held to be equivalent to an ouster; and the fact that the decree is founded on a notice to him when he took the deed, of an equity in the land, does not bar this action.<sup>3</sup> And although the mere existence of a better title is no breach of this covenant, yet if it be accompanied with possession under it, commenced before the deed which contains the covenant was executed, it will amount to a breach.<sup>4</sup> The covenantee is not bound to defend, after notice to the covenantor and refusal on his part to defend;<sup>5</sup> and the notice in such case is not required to be in writing.<sup>6</sup>

§ 312. **Lessee's Right to expel Wrong-doer in Possession.** — **Covenant may be extended.** — If the party holding is a wrong-doer, the remedy of the lessee is as perfect and effectual to dispossess him after, as that of the lessor was before, the execution of the lease, either by ejectment or by summary proceedings under the statute. Therefore, where the lessee is

565, n.; *Phelps v. Sawyer*, 1 Aik. 150; *Maverick v. Lewis*, 3 McCord, 211. In note 2 to *Salmon v. Smith*, 1 Wms. Saund. 204, it is said that, to occasion a suspension of rent, there must be an expulsion or eviction of the lessee; and the plea must state his eviction or expulsion, and keeping him out of possession until after the rent became due. So in *Paige v. Parr*, Style, 432; and Chancellor Kent affirms the same doctrine.

<sup>1</sup> *Morse v. Goddard*, 13 Met. 177; *Moffat v. Strong*, 9 Bosw. 57.

<sup>2</sup> *Kerr v. Shaw*, 13 Johns. 236; *Kortz v. Carpenter*, 5 Johns. 120.

<sup>3</sup> *Martin v. Martin*, 1 Dev. 413.

<sup>4</sup> *Grist v. Hodges*, 3 Dev. 200.

<sup>5</sup> *Jackson v. Marsh*, 5 Wend. 44.

<sup>6</sup> *Miner v. Clark*, 15 Wend. 425; *Bronson, J.*, dissenting.

prevented from entering into possession of the premises on the day stipulated for the commencement of possession by a former tenant, who holds over after his term has expired, his remedy must be against the latter, and not against the lessor.<sup>1</sup> But the covenant may extend to all interruptions, legal or illegal, where there is a plain design evinced to protect the lessee against both, — as, if the covenant be that the party shall enjoy against all claiming, *or pretending to claim, any right, &c.* In this case there was a pretence of right of common set up to two closes comprehended in the lease, and it was considered to be the plain intent of the parties that all disturbance should be guarded against; for if legal claims only were included, the tenant would be subjected to the hardship of trying the right for the landlord, which was the very thing the tenant desired to prevent by this covenant.<sup>2</sup> But on a covenant to save harmless against all lawful and unlawful titles, it must appear, in assigning the breach, that he who entered did not claim under the lessee himself.<sup>3</sup>

§ 313. **Generally, Molestation must amount to Prohibition of Enjoyment.** — A mere personal wrong will not occasion a breach of this covenant; the molestation must be such as concerns the estate, and amounts to a prohibition of enjoyment; for if any one, even the lessor, enters and beats or assaults the lessee, the lessor cannot be charged on this covenant for such a disturbance.<sup>4</sup> But if the covenant indemnifies the lessee against a particular person by name, the covenantor is bound to defend him against the entry of that person, whether by title or otherwise, and whether such entry be lawful or not.<sup>5</sup>

<sup>1</sup> Gardner v. Keteltas, 3 Hill, 330; Gozzolo v. Chambers, 73 Ill. 75; Mechanics' Ins. Co. v. Scott, 2 Hilt. 550; Underwood v. Birchard, 47 Vt. 305; Sigmund v. Howard Bank, 29 Md. 324; *ante*, §§ 176, 177.

<sup>2</sup> Southgate v. Chaplin, 1 Comyn, 239; s. c. 10 Mod. 384; Lucy v. Levington, 1 Vent. 175; Hunt v. Allen, Winch, 25.

<sup>3</sup> Norman v. Foster, 1 Mod. 101.

<sup>4</sup> Ellis v. Welch, 6 Mass. 246; Playter v. Cunningham, 21 Cal. 229; Penn v. Glover, Cro. El. 421; Seddon v. Senate, 13 East, 72; Noble v. Warren, 38 Pa. St. 340.

<sup>5</sup> Foster v. Mapes, Cro. El. 212; Haynes v. Bickerstaff, Vaugh. 118; Fowle v. Welsh, 1 B. & C. 29.

It was formerly held that where a lessee assigned his term for years, and covenanted that the original lease was good, and not made void or encumbered in any way, a previous lease granted by the assignor amounted to a breach, notwithstanding the plaintiff, before the assignment, had notice of the lease, and had been attorned to by the under-tenant; and this, although no actual disturbance had arisen to the lessee.<sup>1</sup> But this has since been held otherwise in this country, and with better reason.<sup>2</sup> And although the mere existence of a previous mortgage, under which the lessee is liable to be dispossessed, does not constitute an eviction, the hostile assertion of the mortgage title, if paramount, will be such if the covenantee yields thereto, and either by purchase or attornment holds under it, although his possession may never actually be changed.<sup>3</sup>

§ 314. **Eviction, how to be Alleged.** — An averment of eviction, under an elder title is not always necessary to sustain an action upon this covenant; for if the grantee be unable to obtain possession, in consequence of an existing possession or seisin by a person claiming and holding under an elder title, it is equivalent to an eviction.<sup>4</sup> And where the breach assigned was, that at the time of the demise to the plaintiff, one I. B. had lawful right and title to the premises, and, having such right and title, entered and ejected the plaintiff; it was objected, on demurrer, that the plaintiff, in alleging the eviction, ought to have shown the title of I. B.; or should at least have averred that I. B. had such a title as was inconsistent with the plaintiff's right to possess those premises;

<sup>1</sup> *Ludwell v. Newman*, 6 T. R. 458; *Levett v. Withrington*, 1 Lutw. 317.

<sup>2</sup> *Pease v. Christ*, 31 N. Y. 141.

<sup>3</sup> See *ante*, § 308, and authorities there cited.

<sup>4</sup> *Duvall v. Craig*, 2 Wheat. 45; *Andrews v. Paradise*, 8 Mod. 318; *Grannis v. Clark*, 8 Cow. 36. And the law laid down in *Kortz v. Carpenter*, 5 Johns. 120, seems contrary to the doctrine generally now prevailing. In *Walker v. Tucker*, 70 Ill. 327, the withholding parcel of the demise was considered an eviction. So *Mostyn v. W. M. Coal Co.*, 1 L. R. C. P. Div. 145. But the burden is on the tenant to show the hostile title to be paramount. *Underwood v. Birchard*, 47 Vt. 305.

for though it was alleged that he had lawful right and title to the premises, he might only have had a right to recover in a real action, and not a right of entry, and that the mischief to be apprehended from this loose mode of pleading was, that it might give cover to an eviction by collusion. But the court overruled the demurrer, observing that if the declaration was certain to a common intent it was sufficient; that it would be doing violence to the words to say that the lawful right and title which it was stated I. B. had did not legalize his entry; and that the fair import of the words was that he had lawful right and title to do that which he did.<sup>1</sup>

§ 315. **Ouster from part of Premises treated as Eviction at Tenant's Option.** — It is also implied that the tenant shall have the free use of the whole of the premises; and if he is ousted from any material part thereof, he may treat it as an eviction from the whole premises, and throw up the lease: nor will he any longer be responsible for rent.<sup>2</sup> But if he prefers it, he may retain possession of so much of the property as he has not been evicted from, and sue the landlord for such damages as he has sustained from the partial eviction.<sup>3</sup> Therefore, if a man makes a lease of a house *with estovers*, and then destroys all the wood, the lessee may have an action of covenant.<sup>4</sup> So where a landlord let certain premises with a portion of an adjoining yard, and agreed that the tenant should have the use of the pump in the yard jointly with himself *as long as*

<sup>1</sup> *Foster v. Pierson*, 4 T. R. 617.

<sup>2</sup> *Etheridge v. Osborn*, 12 Wend. 529; *Hay v. Cumberland*, 25 Barb. 594. Nor if tenant retains the occupation of the residue can the lessor hold him for the proportionate rent thereof. *Leishman v. White*, 1 Allen, 489; *Christopher v. Austin*, 11 N. Y. 216; *Skaggs v. Emerson*, 50 Cal. 3; *Grundin v. Carter*, 99 Mass. 15; *Hayner v. Smith*, 63 Ill. 430; and see *post*, § 379, and notes. But it does not extend to the mode of user of the premises, and a restriction in this respect, enforced by the paramount title, is not a breach of the covenant. *Dennett v. Atherton*, L. R. 7 Q. B. 316; *Fillebrown v. Hoar*, 124 Mass. 580.

<sup>3</sup> *Dudley v. Folliott*, 3 T. R. 584; *Noble v. King*, 1 H. Bl. 34. Or he may quit possession, and sue for an eviction from the whole premises, for all damage incurred, other than what was measured by his rent. *Chatterton v. Fox*, 5 Duer, 64; *Morrison v. Chadwick*, 7 C. B. 266, 284.

<sup>4</sup> *Pomfret v. Ricroft*, 1 Saund. 321.

*it should remain there*; though it was held that these latter words gave the landlord full liberty to remove the pump at his pleasure, yet the court agreed that if those words had not been introduced, the landlord could not have taken it away, or deprived the tenant of the use of it, without subjecting himself to the consequences of a breach of this covenant.<sup>1</sup> And if a man should lease premises with a watercourse on them, and afterwards stop the watercourse, the tenant may consider it an eviction, or maintain an action for damages against him.<sup>2</sup> Or if he covenants for the quiet enjoyment of a certain close, and afterwards sets up a gate across a lane leading to the close, by which the lessee is obstructed in passing to it, this will amount to a breach of the covenant.<sup>3</sup> It was said, also, to be immaterial whether the gate was erected by right or by wrong; for, in either case, being an obstruction, it should not have been erected there.<sup>4</sup> So on the lease of a

<sup>1</sup> *Rhodes v. Bullard*, 7 East, 116. So in *Levitzky v. Canning*, 33 Cal. 29, use by the lessor for a time of the roof of the demised premises as a washroom. In *Grabenhorst v. Nicodemus*, 42 Md. 236, refusal by lessor on a lease of a distillery to give a certificate that was required by law to enable lessee to get a license, without which he could not work the distillery, was held an eviction. In an action for damages in obstructing the lights of the plaintiff's tenement, brought by a tenant for a year against his landlord during the term, he can only recover damages for the time which had elapsed when the suit was commenced, and not for the whole term. *Blunt v. McCormick*, 3 Den. 283.

<sup>2</sup> But not if the supply ceases through drouth or other causes, although the lessor expressly covenanted to supply the premises with water as they were then supplied, — i.e. from a natural spring flowing through pipes. *Ward v. Vance*, 93 Pa. St. 499. But where, the landlord being bound to repair, in consequence of want of repair of water-pipes a tenant was deprived of the easement to use water, and abandoned the premises, it was held that the landlord could only recover rent for the period during which the premises were occupied. *West Side Savings Bk. v. Newton*, 76 N. Y. 616.

<sup>3</sup> *Salman v. Bradshaw*, Cro. Jac. 304; *Ludwell v. Newman*, *supra*; *Andrews v. Paradise*, 8 Mod. 318. But in *Elliott v. Aiken*, 45 N. H. 30, on a lease of premises with a steam-engine, not mentioned specifically in the lease, a withdrawal of power from the engine and entry on the demised premises to cut holes for belting from the engine, was held no eviction.

<sup>4</sup> *Andrews v. Paradise*, *supra*. So an action may be maintained on this covenant for the disturbance of a way of necessity. Per Mansfield, C. J., in *Morris v. Edginton*, 3 Taunt. 24.



messuage with a garden, and a house or office at the further end thereof, a covenant for the quiet enjoyment of the demised premises was held to be broken by the building of a mansion-house on part of the garden.<sup>1</sup>

§ 316. **Immoral Acts of Landlord equivalent to Eviction.** — The tenant may also be deprived of the enjoyment of the premises by the gross *moral turpitude of the landlord*; and his conduct will then be equivalent to an eviction. In a case in New York where the lessor habitually brought lewd women under the same roof with the demised tenement, whose outcries and indecent conversation destroyed the tenant's beneficial occupancy; in consequence of which he quitted, — this was held to be an eviction.<sup>2</sup> But this has been considered an extreme case.<sup>3</sup> And if a tenant abandons the premises and resists the payment of rent subsequently accruing, on the ground that other apartments in the same building, adjoining or below his, are occupied as a place of riot and prostitution, he must show that his landlord created the nuisance by leasing the apartments for that purpose, or that it existed by his connivance and consent.<sup>4</sup>

<sup>1</sup> *Kidder v. West*, 3 Lev. 167. In a similar case, where the lessee held under a lease for ten years it was held that equity would interfere to restrain the erection of the building, since the damage to the lessee might properly be considered as irreparable. *Raband v. Frank*, 7 Mo. App. 64. But where the tenant holds from month to month only, he has not such interest as to entitle him to an injunction to restrain a nuisance injurious to his possession. *Clarke v. Thatcher*, 9 *id.* 436.

<sup>2</sup> *Dyett v. Pendleton*, 8 Cow. 727. This case is doubted in *Gray v. Gaff*, 8 Mo. App. 329.

<sup>3</sup> See *Etheredge v. Osborn*, 12 Wend. 529, 532; *Ogilvie v. Hull*, 5 Hill, 52, 54; *Royce v. Guggenheim*, 106 Mass. 201, 204.

<sup>4</sup> *Gilhooley v. Washington*, 4 N. Y. 217. In this case, Bronson, C. J., says: "In the equitable action for use and occupation, the English courts hold that the tenant is not answerable, unless he has had the beneficial enjoyment of the property, and they have gone a great way in protecting the tenant against disturbances of all kinds; but the principle of these cases has never been applied to an action of covenant for the non-payment of rent, which does not depend on the act of occupation or enjoyment." And even where the action is for use and occupation, he will be liable until he quits. *De Witt v. Pierson*, 112 Mass. 8.

§ 317. **Damages for Breach of the Covenant.** — The rule of damages in an action for the breach of the covenant of quiet enjoyment in leases which formerly prevailed was to give nominal damages and costs only with such mesne profits as the tenant was compelled to pay the true owner.<sup>1</sup> But it has never been regarded with much favor by our courts, and has therefore been relaxed and modified from time to time, in order to prevent the injustice which might otherwise be done to lessees in particular cases. Thus where a lease was made to commence from a future day, and the owner, before the commencement of the term, leased the premises to another person, it was held that the original lessee was not limited to his action of ejectment, but might sue for damages for a breach of the implied agreement to give him possession, and recover the difference between the rent reserved in the lease, and the full value of the term.<sup>2</sup> So in an action against a lessor, for a refusal to give possession of the demised premises, the lessee was allowed to recover the damages arising from the expenses incurred in preparing to remove to and occupy the premises, with the real value of the rent, and the sum agreed to be paid.<sup>3</sup>

<sup>1</sup> *Kelly v. Dutch Ch.*, 2 Hill, 105; *Mock v. Johnson*, 1 *id.* 99; *Baldwin v. Munn*, 2 Wend. 399. This rule was derived from that in regard to conveyances in fee, where the grantor was only held to repay the consideration money and interest; and as the tenant was relieved of rent, which was the consideration paid by him, it was thought he should not receive anything for the market value of his term over this. 4 Kent, Com. 479; *Flureau v. Thornhill*, 2 W. Bl. 1078; *Conger v. Weaver*, 20 N. Y. 140; *Bender v. Fromberger*, 4 Dall. 441. A more liberal rule has, however, prevailed latterly. Thus upon an executory contract to give a lease and a failure or refusal to give it, while the former rule of damages was applied, if the inability or refusal was without any fault or fraud on the part of the party promising to execute it, — where, on the other hand, the refusal to give the lease resulted from the fraudulent conduct of the defendant, — consequent special damages, on proper allegations being embodied in the complaint, might be recovered. Per Bosworth, J., 1 Duer, 342; citing *Baldwin v. Munn*, 2 Wend. 399; *Peters v. McKeon*, 4 Den. 546; *Bitner v. Brough*, 11 Pa. St. 127. But in Pennsylvania, when an eviction occurs by paramount title, without fraud on the lessor's part, the former rule is adhered to, and merely nominal damages are allowed. *Lanigan v. Kille*, 13 Phila. 60; s. c. on appeal, 97 Pa. St. 120.

<sup>2</sup> *Dean v. Roesler*, 1 Hilt. 420; *Trull v. Granger*, 8 N. Y. 115.

<sup>3</sup> *Giles v. O'Toole*, 4 Barb. 261. A lessee, by taking possession under

In a similar case the same court held that the plaintiff's damages were not confined to the mere difference of rent which he might have obtained, over and above what he was to pay, but that the jury might look to the actual value of the bargain which he had made.<sup>1</sup> It has also been held that when a tenant was evicted before the expiration of his term, in a case where the landlord had it in his power to prevent the ouster but did not, he might recover the difference between the value of his lease for the unexpired term, and the rent he had stipulated to pay.<sup>2</sup> The principle of these decisions was subsequently confirmed, and it is now held that on a breach of the covenant for quiet enjoyment in a lease, whether express or implied, where an eviction is occasioned through any fault of the lessor, the measure of damages is the value of the unexpired term, less the rent reserved.<sup>3</sup> The courts of Massachu-

a lease which he was induced to accept by fraudulent representations, waives thereby only his right to rescind the contract, and not his right to recover the damages occasioned by the fraud. *Whitney v. Allaire*, 1 N. Y. 305.

<sup>1</sup> *Driggs v. Dwight*, 17 Wend. 71. "I understand this to be a recognized and well-settled distinction, that if an executory vendor has it in his power to perform his contract, and refuses to do so, or has wrongfully put it out of his power, he takes himself out of this rule (of *Kelly v. The Dutch Church*), and becomes liable under the general rule for the value of the estate at the time it was to have been conveyed. So, in case of a covenant for title in an executed conveyance, if the covenantor himself becomes an actor in ousting his grantee, he puts himself out of the protection of this arbitrary rule of damages, and becomes liable upon his broken covenant for the value of the estate he was instrumental in taking from his grantee." Per Masten, J., in *Mack v. Patchin*, 29 How. 20.

<sup>2</sup> *Chatterton v. Fox*, 5 Duer, 64. And if evicted at a season of the year when the expense of removal is greater than it would have been at the expiration of the term, he may also recover the extra expense. *Id.* See also *Rickett v. Lostetter*, 19 Ind. 125; *Shaw v. Hoffman*, 25 Mich. 162; *Wilson v. Raybould*, 56 Ill. 417; *Dyer v. Wightman*, 66 Pa. St. 455. And even exemplary damages may be given if the ouster is attended with circumstances of aggravation. *Smith v. Wunderlich*, 70 Ill. 426.

<sup>3</sup> *Mack v. Patchin*, 42 N. Y. 167; *Denison v. Ford*, 7 Daly, 384; *Same v. Same*, 10 *id.* 412. In England the old rule (as laid down in *Kelly v. Dutch Church*) is repudiated in two well-considered cases. In *Williams v. Burrell*, 1 Mann. G. & S. 402, it was held, after elaborate argument, that the lessee, on breach of the covenant for quiet enjoyment, was entitled to recover the value of the term lost, as well as the mesne profits

setts and the other Eastern States have never adopted the narrow rule above referred to, but have uniformly held that the measure of damages on an eviction is not to be estimated by the amount of rents, or the lessee's profits, but simply by the real improved value of the lease at the time of the eviction.<sup>1</sup> Where the eviction has been only partial, the recovery is of course proportioned to the value of that part of the premises to which the title has failed.<sup>2</sup>

## SECTION II.

### THE COVENANT AGAINST INCUMBRANCES.

§ 318. **What constitutes an Incumbrance.** — Another covenant on the part of the landlord important to the tenant is for indemnity against incumbrances, or that the tenant shall enjoy the premises free from incumbrances made, or to be made, by the landlord, his heirs, or assigns. Without this covenant a tenant may be obliged to defend his possession, in the middle paid to the owner of the paramount title. In *Locke v. Furze*, L. R. 1 C. P. 441, after extended arguments and a full review of English and American authorities, the same conclusion was reached. "The true measure of damages for the breach of such a contract is what the plaintiff has lost by the breach." Per Blackburn, J.

<sup>1</sup> *Dexter v. Manley*, 4 Cush. 14; *Gore v. Brazier*, 3 Mass. 523; *Hardy v. Nelson*, 27 Maine, 525; *Hosford v. Wright*, Kirby, 3. In *Fillebrown v. Hoar*, 124 Mass. 580, it was held that the evicted tenant might recover damages for injury to his feelings caused by the eviction, but not for injury to his health. The value of the property at the time of the eviction is the proper measure of damages. *Smith v. Strong*, 14 Pick. 128; *Caswell v. Wendell*, 4 Mass. 108; *Jewett v. Brooks*, 134 Mass. 505. "On the question of damages, it is competent for a lessee to prove the condition and capacity of the works from which he has been evicted, with the cost of manufacturing the articles, and their price at the store, as well as in the market." Per Shaw, C. J., in *Dexter v. Manley*, *supra*. And the same rule is now generally followed throughout the United States. See cases *supra*.

<sup>2</sup> *Morris v. Phelps*, 5 L. R. 49; *Hunt v. Orwig*, 17 B. Mon. 73. The just and true rule is that the proportional *value* and not the *quantity*, of the several parts of the land, should be the measure of damages. *Cornell v. Jackson*, 3 Cush. 506. See also *Michael v. Mills*, 17 Ohio, 601.

of an advantageous term, by reason of some prior incumbrance, or be subjected to the burden of some inconvenient easement unknown to the tenant, when he accepted the lease, and have no adequate redress for the injury he may sustain. On general principles every right to, or interest in land, granted to the diminution of the value of the land, but consistent with the passing of the title, is deemed in law to be an incumbrance.<sup>1</sup> An inchoate right of dower, or a right of way over the premises are of this description. So the owner of one of two adjoining lots may be bound by prescription to maintain the whole of the division fence between them. All such easements amount to incumbrances on the land.<sup>2</sup> And it may be well, therefore, for a lessee before accepting a lease to inquire whether the lessor himself may not hold for a term of years, and if so, whether there may not be some restriction in his lease, that may render the property unfit for the purpose he designs it for, and whether the rent reserved on the original lease, with the taxes and assessments in respect thereto, have been paid.

§ 318 *a. Liability of Life Tenant to keep down Incumbrances.*—The obligation to protect a tenant against such incumbrances arises only in favor of a tenant for years, for if a life estate is charged with an incumbrance, the tenant is entitled to no such indemnity from the remainder-man; since he is bound in equity to keep down the interest, taxes, ground rents and such other annual charges as accrue during his occupation out of the profits of the estate. He is not chargeable with the incumbrance itself nor bound to extinguish it;<sup>3</sup>

<sup>1</sup> Per Parsons, C. J., in *Prescott v. Trueman*, 4 Mass. 627. Words sounding in covenant only may operate by way of granting an easement whenever it is necessary to give them that effect in order to carry out the manifest intention of the parties. *Greene v. Creighton*, 7 R. I. 1; *Holmes v. Seller*, 3 Lev. 305.

<sup>2</sup> *Adams v. Van Alstyne*, 25 N. Y. 232; *Bronson v. Coffin*, 108 Mass. 175.

<sup>3</sup> *Swaine v. Perine*, 5 Johns. Ch. 482; *Saville v. Saville*, 2 Atk. 463; *Shrewsbury v. Shrewsbury*, 1 Ves. 233; 4 Kent, Com. 74. Tenant for life is bound to pay the annual taxes from the income of the property: *Cairns v. Chabert*, 3 Edw. 312; *Prettyman v. Walston*, 34 Ill. 175; *Varney v. Stevens*, 34 Me. 361; *Hughes v. Young*, 5 Gill & J. 67; *McMillan v.*

although he must pay a just proportion of any assessment for a permanent public improvement, made during his time, which benefits the inheritance.<sup>1</sup> But he contributes only during the time he enjoys the estate; and where there are successive life estates, and a subsequent life tenant is compelled to pay arrears of interest upon charges affecting the inheritance which had accrued during a prior life estate, he is entitled to repayment out of the inheritance.<sup>2</sup> If he neglects to discharge the taxes, or such other charges as are incumbent upon him, a temporary receiver may be appointed to lease out the premises, until he collects rent enough to pay off such charges.<sup>3</sup> If the incumbrancer neglects to collect his interest from the tenant for life, he may still collect all arrearages from the remainderman;<sup>4</sup> and the estate of the tenant for life would be bound to indemnify the remainderman for the arrearage of interest accrued in his life-time; since the tenant for life must keep down the interest, even though it should exhaust the rents and profits; and the whole estate is to be at the charge of the principal in just proportions.<sup>5</sup>

Robbins, 5 Ohio, 28; *Burhans v. Van Zandt*, 7 N. Y. 523; *Trustees v. Dunn*, 22 Barb. 402; and he is also chargeable with an equitable apportionment of assessments for local improvements: *Fleet v. Dorland*, 11 How. Pr. R. 489. A water tax specifically charged for a particular use, exclusively confined to the apartments of the tenant for life, should be borne wholly by such party. *Graham v. Dunigan*, 2 Bosw. 516; *Booth v. Ammerman*, 4 Bradf. 129, 216. So held also where there was a devise of a dwelling-house to the wife of the testator for life, although stated in the will to be free and clear of all incumbrances. *Lawrence v. Holden*, 3 Bradf. 142; and see *Hepburn v. Hepburn*, 2 *id.* 74.

<sup>1</sup> *Sarles v. Sarles*, 2 Sandf. Ch. 601; *Mosely v. Marshall*, 23 N. Y. 200. Such assessments are usually apportioned between the life tenant and the residuary owners, according to the age of the life tenant. *Miller's Estate*, 1 Tuck. (N. Y. Surr.) 346; *Peck v. Sherwood*, 56 N. Y. 615. This rule was also applied to insurance on the property and to lightning-rods affixed thereto. *Id.* As to the tenant's liability under his express covenant to pay taxes, &c., see *post*, § 398.

<sup>2</sup> *Casborne v. Scarfe*, 1 Atk. 603; *Penrhyn v. Hughes*, 5 Ves. 99; *Burhans v. Van Zandt*, 7 N. Y. 523; *Kirwan v. Kennedy*, 4 Ir. Eq. R. 499.

<sup>3</sup> *Cairns v. Chabert*, *supra*; *Hughes v. Young*, 5 Gill & J. 67.

<sup>4</sup> *Roe v. Pogson*, 1 Madd. 582.

<sup>5</sup> 4 Kent, Com. 74; *Rowel v. Walley*, 1 Rep. in Ch. 218; *Mosely v. Marshall*, *supra*.

§ 319. **Generally, prospective Disturbance will constitute Breach of.** — In order to justify legal proceedings on this covenant, it is not necessary that the tenant should be actually prevented from enjoying the premises. The chance alone of his being disturbed, and his liability to satisfy claimants, or, in other words, the mere existence of an outstanding incumbrance which may defeat the estate, will constitute a technical breach of the covenant, notwithstanding the incumbrance is suffered to lie dormant; yet nothing more than nominal damages can be recovered before an actual injury has been sustained.<sup>1</sup> But if the covenant merely extends to protection against certain incumbrances, it is broken only by an entry and expulsion from the premises, or some disturbance in the possession in consequence thereof.<sup>2</sup> To an action on a covenant contained in the assignment of a lease, for enjoyment free and clear of all arrearages of rent, assigning as a breach that the rent was in arrear and unpaid, it was held sufficient for the defendant to plead that he left so much money in the hands of the plaintiff as would suffice to discharge the rent then in arrear to the lessor.<sup>3</sup> But if a lessee, subject to a condition for re-entry on non-payment of rent, underlets and covenants for quiet enjoyment, without the interruption of himself or of any other person occasioned by his procurement or consent, his default in paying the rent, by means whereof the under-lessee is evicted, is clearly a breach.<sup>4</sup>

§ 320. **Previously existing Mortgages.** — A covenant against incumbrances, if broken by a mortgage previously given by the grantor, is broken at the time the deed is delivered;<sup>5</sup> and

<sup>1</sup> *Jenkins v. Hopkins*, 8 Pick. 346; *Chapel v. Bull*, 17 Mass. 220; *Barrett v. Porter*, 14 *id.* 143; *People v. Nelson*, 13 Johns. 340; *Jackson v. Sternberg*, 20 *id.* 49.

<sup>2</sup> *Anderson v. Knox*, 2 Ala. 156. When a fraudulent concealment of incumbrances will justify a rescission of the contract, see *Cullum v. Br. Bank*, 4 Ala. 21.

<sup>3</sup> *Griffith v. Harrison*, 4 Mod. 249.

<sup>4</sup> *Stevenson v. Powell*, 1 Bulst. 182.

<sup>5</sup> *Bean v. Mayo*, 5 Greenl. 94; *Ingersoll v. Jackson*, 9 Mass. 495; *Stewart v. Drake*, 4 Halst. 141; *Funk v. Voneida*, 11 S. & R. 109; *Davis v. Lyman*, 6 Conn. 249; *Stanard v. Eldridge*, 16 Johns. 254; *Wyman v. Ballard*, 12 Mass. 304; *Hall v. Dean*, 13 Johns. 105.



the party need not, as we have seen, be actually evicted, to enable him to sustain an action.<sup>1</sup> And an exception immediately following such a covenant, of a certain mortgage to a specified amount, operates as a qualification of the covenant, which is broken if the mortgage exceeds that amount.<sup>2</sup> But if a lease for years is cut off by the foreclosure of a mortgage executed prior to the lease, the lessee will have an equitable interest, to the extent of the value of the remainder of his term, in the surplus moneys arising from the sale of the premises; and the court will order payment to be made to him or his assigns, after satisfaction of any prior claims there may be upon the equity of redemption. Nor does the application of this rule seem to be incompatible with any additional claim for indemnity which the tenant may have under this covenant.<sup>3</sup>

§ 321. **Other pre-existing Incumbrances.**—An assessment for a street opening is an incumbrance from the time of the order to open, and is a breach of this covenant, although the grantor had only constructive notice of its widening at the time he executed the lease. The liability to the assessment is not created by the adjudication which confirms the assessment, but by the fact that benefit is received from the widening,—and is to be estimated as of the former date.<sup>4</sup> A pre-existing right to pass over the land to take water from a spring in it is a breach of this covenant; so also is a public highway over the land,<sup>5</sup> or a right to use a wall upon the demised premises as a party-wall.<sup>6</sup> And evidence is not ad-

<sup>1</sup> *Chapman v. Holmes*, 5 Halst. 28; *Garrison v. Sandford*, 7 *id.* 261; *Tufts v. Adams*, 8 Pick. 547.

<sup>2</sup> *Potter v. Taylor*, 6 Vt. 676.

<sup>3</sup> *Clarkson v. Skidmore*, 2 Lans. 238; 46 N. Y. 297.

<sup>4</sup> *Cochran v. Guild*, 106 Mass. 29; *Jones v. Boston*, 104 *id.* 461.

<sup>5</sup> *Harlow v. Thomas*, 15 Pick. 66; *Mitchell v. Warner*, 5 Conn. 497; *Herrick v. Moore*, 19 Me. 313; *Butler v. Gale*, 27 Vt. 739. Otherwise as to a public highway in actual use: *Scribner v. Holmes*, 16 Ind. 142; or a mortgage which the covenantee is bound to pay: *Watts v. Welman*, 2 N. H. 458.

<sup>6</sup> *Giles v. Dugro*, 1 Duer, 331. But a party-wall which creates a community of interest between adjoining proprietors is not a legal incumbrance. *Hendrick v. Stark*, 37 N. Y. 106.

missible to show that the grantee knew of the existence of the easement when he accepted the lease.<sup>1</sup> It has been held, also, that a previous sale of part of the land, by articles of agreement to that effect, is an incumbrance on the legal estate.<sup>2</sup> So an inchoate right of dower is an existing incumbrance, and not a mere possibility or contingency.<sup>3</sup> And an agreement for an underlease, and to take the furniture at a valuation, may be considered void, if on taking possession, the rent is found to be in arrear, and a charge on the goods.<sup>4</sup> The words *permitting* and *suffering* do not bear the same meaning as *knowing of* and *being privy to*; the meaning of the former is, that the party shall not concur in any act over which he has control, and such a covenant extends only to such permissive acts of the lessor as had through that permission an operative effect in charging the estate.<sup>5</sup> If a covenant against incumbrances has been broken before an assignment by the lessee, and the incumbrances have not been removed, the covenant will pass to the assignee, so as to entitle him to any damages he may sustain after the assignment; for this is not a mere assignment of a chose in action, but there is a continuing breach, and the ground of damage has been enlarged since that time.<sup>6</sup>

§ 322. **Damages for Breach of Covenant.** — The rule of damages, upon the breach of a covenant against incumbrances, is said to be the amount which the plaintiff has lawfully paid to discharge the incumbrance; but if he has not paid off the incumbrance, he is still entitled to nominal damages, because an outstanding incumbrance is a technical breach of the covenant, although it does no harm, until he is evicted under it, or until he pays it, which he may do without waiting to be

<sup>1</sup> Kellogg v. Ingersoll, 2 Mass. 97; Hubbard v. Norton, 10 Conn. 431; Prichard v. Atkinson, 3 N. H. 335. This seems to have been doubted in a New York case. Whitbeck v. Cook, 15 Johns. 483.

<sup>2</sup> Seitzinger v. Weaver, 1 Rawle, 382.

<sup>3</sup> Porter v. Noyes, 2 Greenl. 22.

<sup>4</sup> Partridge v. Sowerby, 3 B. & P. 172.

<sup>5</sup> Hobson v. Middleton, 6 B. & C. 295.

<sup>6</sup> Sprague v. Baker, 17 Mass. 586.

evicted.<sup>1</sup> And after he has been evicted, the cost he was put to in defending the action by which he was evicted will form part of the damages he will be entitled to recover.<sup>2</sup> With respect to an incumbering easement the rule of damages is said to be the proportionate value of the easement, to the value of the demised premises.<sup>3</sup>

### SECTION III.

#### FOR FURTHER ASSURANCE.

§ 323. **Defined.** — **Implied in Covenant for Quiet Enjoyment.** — **Runs with the Land.** — A third covenant on the part of a landlord which is sometimes inserted in a lease is the covenant for further assurance; by which the lessor contracts that he will at any time perform and execute such further reasonable acts, writings, and conveyances of or relating to the premises, as the lessee's counsel may legally advise to be necessary for completing the transfer of such an interest, or term, as the parties have contracted for. This covenant is not usually introduced, because the covenant for quiet enjoyment necessarily implies that the lease is perfect, as a good

<sup>1</sup> *Dimmick v. Lockwood*, 10 Wend. 142; *Delavergne v. Norris*, 7 Johns. 858; *Hall v. Dean*, 13 *id.* 105; *Stanard v. Eldridge*, *supra*; *Prescott v. Trueman*, 4 Mass. 627; *Garfield v. Williams*, 2 Vt. 327; *Garrison v. Sandford*, 7 Halst. 261. In an action on the covenant of seisin, for the purpose of ascertaining the measure of damages, the true consideration, and the fact that only part of it has been paid, may be shown by parol, although the deed expresses a different consideration, and acknowledges that the whole of it has been paid; and there is no occasion, in such a case, to resort to a court of equity for relief. *Bingham v. Weiderwax*, 1 N. Y. 509.

<sup>2</sup> *Waldo v. Long*, 7 Johns. 173. The amount fairly paid to remove the incumbrance will be the measure of damages: *Comings v. Little*, 24 Pick. 266; though paid after the action has been commenced: *Brooks v. Moody*, 20 *id.* 474. But if the sum paid exceeds the whole value of the estate, the measure of damages is that value only. *Norton v. Babcock*, 2 Met. 210.

<sup>3</sup> *Giles v. Dugro*, *supra*.

and valid demise; and the granting of an imperfect lease, would therefore be a breach of the latter covenant. It is always, however, inserted in conveyances of freehold property, and sometimes also in assignments of leasehold premises; and its great advantage is that where a defect is discovered in the title, which can be supplied by the grantor, the grantee may file a bill for specific performance. It is a covenant running with the land, of which an under-tenant may avail himself, as well as the original lessee;<sup>1</sup> and may be important to both, inasmuch as it relates to the title of the lessor, and also to the instrument of conveyance; operating as well to secure the performance of all acts for supplying defects in the former, as to remove all objections to the sufficiency and security of the latter.

§ 324. **Obligations of Lessor under.** — If there be a defect in the title, the lessor will be decreed, under this covenant, to convey to the lessee such a title as he may afterwards obtain; even although he may have acquired it by purchase, and for a valuable consideration.<sup>2</sup> Under it also a lessee may require the removal of a judgment, or other incumbrance which endangers his possession.<sup>3</sup> And where a defendant, by an agreement of present demise, let certain premises to the plaintiff, which the parties in possession refused to surrender, it was held that the defendant was bound to put the plaintiff in possession, as a contract to do so was implied in such letting; and that the plaintiff might maintain an action for the breach of such a contract, and was not obliged to resort to an action of ejectment against the wrongful occupant.<sup>4</sup> But where a party covenanted that he had not done, or permitted, nor suffered to be done, any act whereby the estate was incumbered, it was held that his assent to an act which he could not have pre-

<sup>1</sup> *Middlemore v. Goodale*, Cro. Car. 503.

<sup>2</sup> *Middlebury College v. Cheney*, 1 Vt. 336; *Taylor v. Debar*, 1 Ca. in Ch. 274; s. c. 2 *id.* 212; *Seabourne v. Powell*, 2 Vern. 11; and see *Langford v. Pitt*, 2 P. Wms. 630.

<sup>3</sup> *King v. Jones*, 5 Taunt. 427. A mortgagor is not bound to release his equity of redemption. *Atkins v. Uton*, 1 Ld. Ray. 36.

<sup>4</sup> *Coe v. Clay*, 5 Bing. 440.

vented was no breach of this covenant.<sup>1</sup> Nor is an entry by the lessee a disseisin in fact, unless the entry be forcible, or with a manifest intention to disseise. A disseisin being the wrongful act of a stranger, it is no breach of the covenant against defects in the title, that the person under whom the vendor derives title had leased part of the premises sold to one who had afterwards entered on the premises demised.<sup>2</sup>

§ 325. **Reasonable Acts required by, are necessary Acts.** — The term "reasonable act," generally made use of in this covenant, means such an act as the law requires to be done; but if it be unnecessary, it is not a reasonable act, nor one which would be required by law. Therefore, a refusal to do something which, if executed, would be useless and nugatory, — as, to direct trustees to raise money by mortgage to pay an annuity already provided for by a demise of the premises, — will not constitute a breach of this covenant.<sup>3</sup> And to make such assurance as the lessee's counsel shall advise requires that the counsel shall give his advice, and that the covenantor shall be notified thereof. It also requires that the covenantee shall procure the instrument to be drawn and tendered to the covenantor for execution.<sup>4</sup>

§ 326. **Obligation of Covenantor to execute Deed.** — According to the English cases, if a covenantor can read the proposed deed, he is bound to execute and deliver it immediately upon its being tendered to him for execution; and he will not be allowed time to obtain the opinion of counsel, although he may not be acquainted with the legal sense and operation of the words, or be able to know whether they are embraced in his covenant or not. But, if it is written in a language he does not understand, he may refuse to deliver it until he can

<sup>1</sup> *Hobson v. Middleton*, 6 B. & C. 295.

<sup>2</sup> *Jerritt v. Weare*, 3 Price, 575. A wrongful possession does not divest the title of the person against whom possession is held adversely. *Doe v. Hull*, 2 D. & R. 38.

<sup>3</sup> *Warn v. Bickford*, 9 Price, 43.

<sup>4</sup> *Bennet's Case*, Cro. El. 9; *Stafford v. Bottonne*, *id.* 298; *Baker v. Bulstrode*, 1 Mod. 104.

procure some one to explain it to him.<sup>1</sup> The same rigidity, however, does not appear to exist in our law; for in an action upon a covenant for further assurance, "as by the plaintiff or his counsel should be reasonably devised, advised, or required," the breach assigned was that the plaintiff had requested the defendant to make a lawful and reasonable assurance to the plaintiff of the right of dower of defendant's wife, yet the said defendant had not made such assurance, &c. On demurrer, it was held that the breach was bad, for the plaintiff, or his counsel, were to devise the further assurance, and, after having done so, the plaintiff was bound to give notice thereof to the defendant, allowing him a reasonable time to consider of it; and that such facts ought to be averred.<sup>2</sup>

#### SECTION IV.

##### THE COVENANT TO REPAIR.

§ 327. **Not an implied Covenant.** — The landlord sometimes covenants to repair; but although his own interest will during the term generally prevent him from suffering the premises to run into decay, the tenant cannot compel him to repair, unless he has bound himself by an express agreement to that effect.<sup>3</sup> The common law has always thrown the burden of

<sup>1</sup> *Manser's Case*, 2 Co. 3, a; *Wotton v. Cooke*, 3 Dy. 337, b; 1 Roll. Abr. 441; *Symms v. Smith*, Cro. Car. 299.

<sup>2</sup> *Millar v. Parsons*, 9 Johns. 336; *Sweitzer v. Hummel*, 3 S. & R. 228.

<sup>3</sup> A mere verbal agreement or promise of the landlord to make repairs on premises which the lessee holds under a covenant on his own part to keep the premises in repair, cannot be enforced against the landlord, since the promise merges in the written lease. *Hartford, &c., St. Co. v. Mayor, &c.*, 78 N. Y. 1. And the landlord's mere promise to repair, based upon the tenant's agreement to relinquish a purpose of abandoning the premises, cannot be supported, for want of consideration. *Eblin v. Miller*, 78 Ky. 371. But an agreement of the landlord to repair, for sufficient consideration, and not inconsistent with the lease, may be supported. Thus the acceptance of a lease containing a covenant that the lessee will give up the premises to the lessor at the end of the term in as good order and condition "as the same now are or may be put into by the lessor," is a

repairs upon the tenant. He was regarded in fact as a bailee of the premises, and bound to restore them substantially as he received them.<sup>1</sup> Enjoying the benefits, it seems to be right that he should bear the inconveniences of his position; and it would be unjust that the expense of accumulated dilapidation should, at the end of the tenancy, fall upon the landlord, when a small outlay on the part of the tenant, in the first instance, would have prevented any such expense becoming necessary.

§ 328. **In Absence of, Landlord not bound for Repairs.** — In conformity to this principle, it was laid down by Chief Justice Savage that, at common law, "it is not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them authorizing him to do so. The tenant takes the premises for better or for worse, and cannot involve the landlord in expense for repairs without his consent."<sup>2</sup> In an early case, where there was a

sufficient consideration for an agreement, executed and delivered by the lessor contemporaneously with the lease which refers in terms to the lease, and in which the lessor binds himself to make forthwith certain repairs. *Vass v. Wales*, 129 Mass. 88. Where the lessee of a room in a building agreed to make needed repairs in and about the room, it was held that the lessor was impliedly bound to keep the residue of the building in repair so as to protect the room. *Bissell v. Lloyd*, 100 Ill. 214.

<sup>1</sup> *Foster v. Bott*, 6 Mass. 63.

<sup>2</sup> *Mumford v. Brown*, 6 Cow. 475; *Davis v. Bancks*, 2 Sweeny, 184; *Sherwood v. Leaman*, 2 Bosw. 127; *Post v. Vetter*, 2 E. D. Smith, 248; *Withey v. Matthews*, 52 N. Y. 512; *Kellenberger v. Foresman*, 13 Ind. 475; *Estep v. Estep*, 23 *id.* 114; *Biddle v. Reed*, 33 *id.* 529; *Casad v. Hughes*, 27 *id.* 141; *Benjamin v. Henry*, 51 Ill. 492; *Colbeck v. Girdlers Co.*, 1 L. R. Q. B. Div. 234; *Elliott v. Aiken*, 45 N. H. 30; *Heintze v. Bentley*, 34 N. J. Eq. 562; *Wooley v. Osborne*, 39 *id.* 54; *Samuel v. Scott*, 13 Phila. 64. Thus on lease of a hotel: *Howard v. Doolittle*, 3 Duer, 464; *Morris v. Tillson*, 81 Ill. 607; of salt-works: *Clark v. Babcock*, 23 Mich. 164; of water-works: *Skillen v. Water-works*, 49 Ind. 193; or where the want of repair is in the public way: *Fisher v. Thirkell*, 23 Mich. 1; *Pretty v. Bickmore*; and other cases, *supra*, §§ 175, 176. The rule is extended to apply to parts of premises not expressly demised, but necessary to the tenant's protection or convenience. *Krueger v. Ferrant*, 29 Minn. 385; and see *Wilkinson v. Clauson*, *id.* 91. Nor will a landlord's liability to make repairs be implied from the fact that he holds as trustee under a will



lease of a house, with the use of a pump standing on the lessor's premises, it was held that the tenant had no remedy against the landlord for suffering the pump to be out of repair, unless he had agreed to keep it in repair.<sup>1</sup> So, where a tenant, under a covenant to repair, pulled down a party-wall (being in a ruinous condition), and rebuilt it at the joint expense of himself and the occupant of the adjoining house, to whom he had given notice in the landlord's name but without his authority, he was not allowed to maintain an action against his landlord for a moiety of the expense of rebuilding such party-wall.<sup>2</sup>

which directs him to make repairs, and that the lease is in terms made subject to the provisions of the will. *Wheeler v. Crawford*, 86 Pa. St. 327. He is not liable for injuries to the tenant by want of repair: *Brewster v. DeFremery*, 33 Cal. 341; *Doupé v. Genin*, 45 N. Y. 119; *Joyce v. DeGiverville*, 2 Mo. App. 596; *Spellman v. Bannigan*, 36 Hun, 174; *McAlpin v. Powell*, 55 How. Pr. 163; *Mendel v. Fink*, 8 Bradw. (Ill.) 378; but he is liable for unskilful repairs: *Gill v. Middleton*, 105 Mass. 477. In *Meany v. Abbott*, 6 Phila. 256, it was even held that if the lessor employed a competent workman, he was not liable for his negligence. And see *ante*, §§ 175, 176, that he is not liable to third persons for injuries from want of repairs. In California the Civil Code, § 1942, gives the option to the tenant, after notice to landlord, to make repairs not requiring an expenditure of more than a month's rent, the cost thereof to be deducted from the rent, — or to vacate the premises discharged from the performance of the conditions of the lease. See *Van Every v. Ogg*, 59 Cal. 563. In Georgia a statutory duty to repair is imposed upon the landlord in the absence of any covenant on the subject. *Lewis v. Chisholm*, 68 Ga. 40; and see *Bosworth v. Thomas*, 67 *id.* 640.

<sup>1</sup> *Pomfret v. Ricroft*, 1 Saund. 321; 7 East, 116; *Surplice v. Farnsworth*, 7 M. & G. 576; *Gott v. Gandy*, 2 Ellis & B. 845. A lessor is not bound to repair the water-pipes outside the demised premises, so as to keep up a supply of Croton water. *Coddington v. Dunham*, 3 Jones & S. 412.

<sup>2</sup> *Pizey v. Rogers*, Ry. & M. 357; *Leslie v. Smith*, 32 Mich. 64. The doctrine above stated is to be taken with a qualification, so far as it relates to the State of New York, where in one case, by statute, a landlord must keep his premises in tenantable condition, if he expects to retain the tenant; and that is if the building in his occupation, without his fault or neglect, shall be destroyed, or be so much injured by the elements or any other cause as to become untenable and unfit for occupation. Laws of New York of 1860, c. 345, and see *post*, § 375. This act does not affect the common-law rule requiring a tenant to make ordinary repairs; it only relieves him in case of an injury resulting from some sudden and

§ 329. **Nor to Rebuild in case the Premises are injured by Fire.** — If the premises become uninhabitable by fire, and the landlord, having insured them, has recovered the insurance-money, the tenant cannot compel him, either at law or in equity, to expend the money so recovered in rebuilding, unless he has expressly engaged to do so.<sup>1</sup> Nor will a court of equity, under such circumstances, prevent the landlord from even suing for the rent, until he shall have rebuilt the premises;<sup>2</sup> for a tenant — unless there is an express agreement to the contrary, or the landlord is under a covenant to repair — is obliged to continue the payment of rent during the term, although the unexpected action of the elements, or other causes. *Suydam v. Jackson*, 54 N. Y. 450. And if the lessee continues in possession to the end of his term the statute has no application, and he cannot counterclaim damages for sickness arising from the presence in the premises of a nuisance, such as sewer gas, to remove which there is no implied covenant in the lease. *Chadwick v. Woodward*, 13 Abb. N. C. 441; s. c. 17 Hun, 163. A different rule also prevails in Louisiana, where it is held that a lessor is bound to keep the premises in a condition fit for the purposes for which they were leased, and if he fails to make the necessary repairs during the term, the tenant may make them himself, and deduct from the rent the amount which he shall be obliged to pay therefor. *Perrett v. Dupré*, 3 Rob. (La.) 52; Code, Art. 2664. And in that State a lessor is also bound to indemnify the lessee for all damages sustained by the latter in consequence of the vices and defects of the thing leased, though the lessor knew nothing of their existence at the time of the lease, and even where they have arisen since. But the tenant must show that the repairs were reasonable: *Shall v. Banks*, 8 Rob. (La.) 168; Code, Art. 2663. And where, after the commencement of a lease, the house became so much injured as to be incapable of being rendered fit for the purposes for which it was leased, otherwise than by rebuilding it, and the lessor offered to dissolve the lease, which the lessee refused, and continued to occupy the building, — it was held that the lessor was not responsible for any damage subsequently sustained by the lessee in consequence of the condition of the building, and that the latter was not entitled to claim any diminution of the rent for the period he continued to occupy the premises after the offer of the lessor to annul the lease. *Coleman v. Haight*, 14 La. Ann. 564.

<sup>1</sup> *Pindar v. Rutter*, 1 T. R. 312; *Carter v. Rockett*, 8 Paige, 437.

<sup>2</sup> *Leeds v. Cheetham*, 1 Sim. 146; *Belfour v. Weston*, 1 T. R. 310; *Holtzapffel v. Baker*, 18 Ves. 115. So *Loft v. Dennis*, 1 Ellis & E. 474, where the insurers had the option whether to pay or rebuild, and elected to pay; and the tenant averred that he should have insured if there had not been this insurance on the premises; this was held, on demurrer, no defence to action for use and occupation.

premises may become untenable for want of repairs, or from any other cause, or should even have been burnt down in the meantime.<sup>1</sup> And it is even held that if a landlord, being under no legal obligation to repair, should, after the lease has been entered into, promise to do so, his promise is without consideration, and no action can be predicated upon it.<sup>2</sup> No implied covenant to rebuild or repair damages on the part of the landlord arises at common law from the exception of casualties by fire, tempest, or other cause, in the tenant's covenant to repair.<sup>3</sup>

§ 330. **Landlord's Obligations under. — Tenant's Damages for Breach.** — When a landlord expressly covenants to repair, the obligation will be enforced only after he has been duly notified of the want of repair.<sup>4</sup> And he will not be excused from performance by proof of the lessee's negligence in the use of the premises. His obligation extends to the rebuilding of the premises in case of their destruction by fire, and to the keeping of the house tight, and the floors in good condition, if they were so originally constructed and the tenant's business requires it.<sup>5</sup> A general covenant to repair, when made by the

<sup>1</sup> *Moffatt v. Smith*, 4 N. Y. 126. The destruction of the premises which the landlord had covenanted to repair does not discharge the rent. *Leavitt v. Fletcher*, 10 Allen, 121. There is no implied condition that the tenant may quit if the repairs are not done. *Surplice v. Farnsworth*, 7 M. & G. 576; *Sutton v. Temple*, 12 M. & W. 52.

<sup>2</sup> *Proctor v. Keith*, 12 Ky. 252; *Libbey v. Tolford*, 48 Me. 316; *Gottberger v. Radway*, 2 Hilt. 342; *Speckles v. Sax*, 1 E. D. Smith, 253.

<sup>3</sup> *Weigall v. Waters*, 6 T. R. 488. So, not by his covenant for tenant's quiet enjoyment. *Brown v. Quilter*, Amb. 619; *Withey v. Matthews*, 52 N. Y. 512.

<sup>4</sup> *Makin v. Wilkinson*, L. R. 6 Exch. 25; *Manchester Bond. Warehouse Co. v. Carr*, 5 C. P. D. 507; *Cooke v. England*, 27 Md. 14. It is the tenant's duty to notify him of the want of repair. *Wolcot v. Sullivan*, 6 Paige, 117; *Ploen v. Staff*, 9 Mo. App. 309. And he is in default only after a reasonable time has elapsed. *Walker v. Gilbert*, 2 Rob. (N. Y.) 214. And if the lessor neglects to repair, the tenant may either repair, and charge the landlord, or may sue for the damages from non-repair. *Hexter v. Knox*, 63 N. Y. 561.

<sup>5</sup> *Flynn v. Trask*, 11 Allen, 550; *Leavitt v. Fletcher*, 10 *id.* 110. But a covenant to build does not bind the lessor to rebuild when destroyed by fire. *Gowell v. Lumley*, 39 Cal. 151.

lessor, requires him not only to keep the premises in good repair, but to put them in that condition, although the tenant may have entered.<sup>1</sup> And if he neglects to make suitable repairs, after being thereunto required by the tenant, the latter may, after waiting a reasonable time, make such repairs himself, and recover the expense from his landlord; or he may at his option leave the premises unrepaired, and recover any damages he may have sustained from the landlord's default therein.<sup>2</sup> Upon a breach of this covenant, a tenant is entitled to remuneration for all expenditures of money, time,

<sup>1</sup> *Wait v. Kelsey*, 38 N. Y. 180. And the repairs must be suitable to tenant's condition in life. *Cohen v. Habenicht*, 14 Rich. Eq. A license to the lessor to enter to repair is implied from the covenant. *Saner v. Bilton*, 7 Ch. D. 815. Although performance of the lessor's covenant to put the premises in repair, in a lease to begin *in futuro*, is a condition precedent to the payment of the rent, the tenant waives such performance, or imperfect performance, by accepting and continuing in possession without objection. *Williamson v. Miller*, 55 Iowa, 86; *Kiernan v. Germain*, 61 Miss. 498; *Chadwick v. Woodward*, 13 Abb. N. C. 441.

<sup>2</sup> *Buck v. Rogers*, 39 Ind. 222; *Myers v. Burns*, 35 N. Y. 269; *Sparks v. Bassett*, 49 N. Y. S. C. 270. A covenant to keep the premises in repair was held to be broken by permitting the chimney-flues of a hotel to remain in so foul a condition that the rooms could not be used with a fire, in consequence of the issuing of smoke from the grate into the rooms, whenever a fire was lighted therein. *Id.* The covenant to keep a mill in good repair was held to embrace an obligation on the part of the lessor to keep the tail-race, as well as the mill, in repair. But this, it was said, does not absolve the tenant from the ordinary care which is always required of millers in operating mills, — such as cleaning the stones, adjusting the machinery, and cleaning the race of such deposits as usually arise from the ordinary use of a mill. But where the landlord has covenanted to *keep in repair*, while the tenant may sue during the term, he cannot recover damages for the whole of the term, but only the cost of repair at the time of suit. *Block v. Ebner*, 54 Ind. 544. Where the lessor covenanted to rebuild forthwith in case of the destruction of the building by fire, and if he should fail to do so within six months, that the lease should terminate at the lessee's election, it was held that the lessee's remedy under the lease was not limited to a termination of the lease as specified, and that he was not required to notify the defendant of his election; that his remedy was complete upon failure to rebuild, and that the fact that he did not pay, or offer to pay, rent after the fire did not show a surrender of his claim, or suspend his right of action against the lessor upon the covenant. *Ganson v. Tift*, 71 N. Y. 48.

and labor in making the repairs, and to the damages sustained by his losing the use of the premises, while they are being placed in the condition in which the landlord should have kept them. But the loss of custom is too speculative, and dependent upon too many contingencies, to constitute a proper ground for damages.<sup>1</sup>

§ 381. **Obligations of the Parties under Covenant to rebuild.** — If the landlord agrees to rebuild in case the premises shall be burned, he is only bound to restore the premises to the same condition in which they were *before he let them*, and is not required to rebuild any such additions as the tenant may have made himself. A tenant in such case is bound to continue the payment of rent while the premises are rebuilding, provided there is no unnecessary or unreasonable delay on the part of the landlord to rebuild after he had been notified of the destruction of the premises.<sup>2</sup> And if he quits the premises and sends the key to the landlord, who then proceeds to repair, there will be no abatement of the rent during the time that the landlord is with reasonable diligence making the repairs.<sup>3</sup> The landlord's covenant to repair and the tenant's

<sup>1</sup> *Middlekauff v. Smith*, 1 Md. 329; *Myers v. Burns*, *supra*. And it is held that the agreement to repair does not contemplate damages resulting from destruction of life or injury to property caused by the omission to repair. *Arnold v. Clark*, 45 N. Y. S. C. 252. If the owner of a building is bound to repair, he is not relieved from his liability for injuries caused by defects in the building, or by the falling of snow and ice therefrom. *Kirby v. Boylst. Mkt.*, 14 Gray, 249. The entry of the landlord to repair for the benefit of the tenant is not an eviction. *Peterson v. Edmonson*, 5 Harr. 378; and when he enters for that purpose, he is not liable in damages for interrupting the business of the lessee or otherwise in the exercise of such right, unless it appears to have been done in a wanton, unskilful, or negligent manner. *Turner v. McCarthy*, 4 E. D. Smith, 249. In an action for a breach of this covenant, the tenant cannot recover for rent lost by his under-tenant's leaving the premises in consequence of their condition, unless especially averred. *Oettinger v. Levy*, 4 *id.* 288. On the other hand, it is held that the tenant may recover damages for breach of the covenant, although, with the landlord's assent, he has sub-let for the same rent as that agreed on in the lease. *Watson v. Hooten*, 4 Bradw. (Ill.) 294.

<sup>2</sup> *Loader v. Kemp*, 2 C. & P. 375.

<sup>3</sup> *Livermore v. Eddy*, 33 Mo. 547; *Kellenberger v. Foresman*, 13 Ind. 475.

to pay rent are independent covenants, and at common law a breach of the former is no defence to an action on the latter.<sup>1</sup> And this still remains the law, both in England and the United States.<sup>2</sup> On the other hand, it is now very generally held that the landlord's failure to repair, though not an eviction, may still avail the tenant by way of counter-claim or recoupment, and as well when the action is for rent as when it is for use and occupation.<sup>3</sup> As this is a covenant running with the land, it is one of which an assignee of the term or an under-tenant may have the benefit; and it is also obligatory upon a grantee of the reversion.<sup>4</sup>

<sup>1</sup> *Belfour v. Weston*, 1 T. R. 310; *Hare v. Groves*, 3 Anst. 607.

<sup>2</sup> *Surplice v. Farnsworth*, 7 M. & G. 576; *Watson v. Coffin*, 11 Johns. 495; *Leavitt v. Fletcher*, *supra*; *Speckles v. Sax*, 1 E. D. Smith, 253; *Hill v. Bishop*, 2 Ala. 320; *Tibbitts v. Percy*, 24 Barb. 39; *Wright v. Lattin*, 38 Ill. 298. It has sometimes been said that where the premises are destroyed, and the landlord fails to rebuild according to his covenant, it is an eviction, and the tenant can abandon the premises and resist the payment of rent. *Gates v. Green*, 4 Paige, 355, 358; *Womack v. M'Quarrie*, 28 Ind. 103; *Gibson v. Perry*, 29 Mo. 245; and 3 Kent, Com. 466, 467, is referred to as the authority therefor. No such proposition is there to be found. On the contrary, the civil law doctrine which exempted the tenant from rent on destruction of his premises is expressly denied to have been adopted into the common law. In all of the above cases, this statement was wholly *obiter*, the tenant in each instance being held for the rent, on his express covenant. On principle the tenant remains liable, because the soil remains his during the term. Of course, where he has no interest in the soil, but is tenant of a room or story only, his liability ceases when his tenement is destroyed. See *post*, § 520. Or again, if the repairs are to be done *before* the tenant goes in, this may be a condition precedent, and he will be excused from rent if he does not take possession. *Barnes v. Strohecker*, 21 Ga. 430. And this defence he does not waive by entering before the day: *id*; but will if he remains in under the lease: *Wright v. Lattin*, *supra*; *Lunn v. Gage*, 37 Ill. 19.

<sup>3</sup> As this subject is considered more at large under the covenant to pay rent, *post*, § 374, where the several grounds of recoupment are stated fully, the reader is referred there for further discussion of this subject.

<sup>4</sup> *Demarest v. Willard*, 8 Cow. 206; *Allen v. Culver*, 3 Den. 284.

## SECTION V.

## THE COVENANT TO RENEW THE LEASE.

§ 332. **Defined. — Tenant's Option to renew.** — Another covenant sometimes inserted in a lease on the part of a landlord, adding much to the stability of a lessee's interest, and affording an inducement to permanent improvement, is that he will *renew the lease* at the expiration of the term, for the same or some other period mentioned. Under this covenant, the lessor is bound to make another lease of the premises, either to the lessee or his assignee; and if the terms of the covenant are express and unequivocal, the performance of it will be enforced by a court of equity.<sup>1</sup> Sometimes, instead of a covenant for a renewal, it is agreed that the tenant may have the privilege or option of a further term.<sup>2</sup> In this case, if notice is stipulated for, it must be given;<sup>3</sup> but, if not stipu-

<sup>1</sup> *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Pritchard v. Ovey*, 1 Jac. & W. 396; *Rees v. Ld. Dacre*, cited 9 Ves. 332; *Tritton v. Foote*, 2 Bro. Ch. 636; *Furnival v. Crew*, 3 Atk. 83; *Worthington v. Lee*, 61 Md. 530. And it is held that performance may be enforced, although the lessee has allowed the term to expire without applying for a renewal, since time is not of the essence of the contract. *Myers v. Silljacks*, 58 *id.* 819. A promise by letter to renew a lease, in consideration of money already laid out by the tenant, is *nudum pactum*, and no specific performance will be decreed, nor is it varied by money having been laid out afterwards. *Robertson v. St. John*, 2 Bro. C. C. 140. The right of renewal may be waived, as by the lessee's going into an arbitration to determine the value of his improvements, the lease providing for a renewal, or payment for the lessee's improvements, at the lessor's option. *Crosby v. Moses*, 48 N. Y. S. C. 146.

<sup>2</sup> See *Sutherland v. Goodnow*, 108 Ill. 528. When the covenant is binding on the lessor only, as that the lessor "shall and will at the expiration of the term" grant a new lease, etc., the lessee is not bound to accept the renewal. *Bruce v. Fulton Nat. Bk.*, 16 Hun, 615; s. c. on appeal, 79 N. Y. 154.

<sup>3</sup> *House v. Burr*, 24 Barb. 525; and such additional term is not a new demise, but an extension of the prior term. *Id.*; *Brown v. Parsons*, 22 Mich. 24. Where the lease provides for a written notice in order to a renewal, the estate terminates in default of notice at the end of the term, and an additional estate cannot be created by oral agreement or waiver



lated for, the tenant's mere continuance in possession and paying rent, though with no express notice of his desire for the further term, entitles and binds him thereto.<sup>1</sup> If, however, the covenant be to *renew* within the term at the request of the lessee, without naming his executors, and the lessee dies, the executors are entitled to the renewal, if they apply within the term.<sup>2</sup> A covenant that the lessee shall have the refusal

of the stipulation as to notice for a term longer than that within which an oral letting for years is valid under the Statute of Frauds. *Beller v. Robinson*, 50 Mich. 264. In *Bradford v. Patten*, 108 Mass. 153, the widow's remaining in for a year, and administrator's paying rent during that time, was held not enough in law from which to presume that notice had been given.

<sup>1</sup> *Clarke v. Merrill*, 51 N. H. 415; *Kramer v. Cook*, 7 Gray, 550; *Kimball v. Cross*, 136 Mass. 300; *Delashman v. Berry*, 20 Mich. 292; *Darling v. Hoban*, 53 *id.* 599; *Ins. Co. v. Nat. Bk. of Missouri*, 71 Mo. 58. So *Levitzky v. Canning*, 83 Cal. 299, though it does not appear how the election was exercised. The tenant may show that he held over under a special agreement with the lessor; for the holding over creates a presumption merely that the tenant has exercised his option to renew. *Atlantic Nat. Bk. v. Demmon*, 139 Mass. 420; see *Barnett v. Feary*, 101 Ind. 95. In *West Tr. Co. v. Lansing*, 49 N. Y. 499, the option was held void for uncertainty. So *Whetstone v. Davis*, 34 Ind. 510; and see *post*, § 333. But in *Holley v. Young*, 66 Me. 520, though the tenant's privilege was to occupy "as long as he wished," this was held valid; and sufficiently evidenced by his merely remaining after his term, and is determinable only by tenant. So *Sweetser v. McKenney*, 65 Me. 225. In *Fuller v. Giles*, 29 Ind. 114, where the option was for one, two, or three years, it was held that remaining would establish the election for one year, but it needed express notice for the further terms. In *Thiebaud v. Bk. Vevay*, 42 *id.* 212, the rule in the text is denied. But the weight of authority sustains the text, and the reasoning in *Delashman v. Berry*, *supra*, seems conclusive, — namely, that the tenant's holding over must be referred to a rightful holding under the privilege, rather than to a wrongful one as tenant at sufferance. And the general rule of the text is adopted in *Montgomery v. Commissioners*, 76 Ind. 362 (where *Thiebaud v. Bk. Vevay*, *supra*, is distinguished), and *Terstegge v. First German &c. Soc.* 92 *id.* 82.

<sup>2</sup> *Hyde v. Skinner*, 2 P. Wms. 196; *Chapman v. Dalton*, 1 Plowd. 286. With some corporations, as for instance, Trinity Church in New York, and even with private individuals, it is usual to grant a new lease to the tenant in possession, at the end of the term; from which fact many tenants claim a *right of renewal*. But, independent of some positive local custom, — of which none such exists that the writer is aware

of the premises at the expiration of the lease, for a specified term, is a covenant to renew the lease at the same rent for that term. It is violated by a refusal of the lessor to renew the lease, except at an increased rent. And the acceptance by the lessee of a new lease, at the increased rent after such a violation, at the same time protesting against a right to exact the increased rent, and claiming to reserve his right of action for the breach of the covenant, will not prevent him from recovering, as damages for the lessor's breach of his covenant, the difference between what the tenant was to have paid and what he was compelled to pay. The lessee in such case is not obliged to wait until the termination of the lease before he makes his election to have the lease renewed; for the lessor is bound to renew when the lessee makes his election, and demands the renewal.<sup>1</sup> And a tenant under these circumstances would have a right to hold over, and consider himself a tenant at the original rent, until the renewal rent is fixed according to the terms of the contract, and a lease tendered.<sup>2</sup> As this is

of, — it is a demand that cannot be enforced at law; nor have applications to a court of equity for the purpose been attended with greater success. The so-called *tenant-right of renewal* confers no positive interest, either vested or contingent, and is a mere naked possibility, depending solely on the caprice of the lessor. A *right* of renewal must be the result of express compact; and to secure it is the object of the covenant we are now discussing.

<sup>1</sup> *Tracy v. Albany Exch. Co.*, 7 N. Y. 472; *Driggs v. Dwight*, 17 Wend. 71; *Crawford v. Kastner*, 63 How. Pr. 90; *Sutherland v. Goodnow*, 108 Ill. 528; *McAdoo v. Callum*, 86 N. C. 419. And where notice is required, it has been held that the lessee is not merely entitled, but bound, to notify the lessor before the expiration of the first term of his election to have a renewal. *Renoud v. Daskam*, 34 Conn. 512. In New York, a lease of agricultural lands for twelve years, with a covenant of renewal for twelve years longer if the lessor shall live, and a further covenant to continue the renewals every twelve years so long as the lessor shall live, is good for the first twelve years, but the covenants for renewal are in contravention of the constitution of that State (Art. 1, § 14), and therefore void. The covenant for renewal, being independent, may fall without impairing the grant for the first twelve years. *Hart v. Hart*, 22 Barb. 606. See *Stephens v. Reynolds*, 6 N. Y. 454. *Ante*, § 74.

<sup>2</sup> *Ryder v. Jenny*, 2 Rob. 56. That the tenant may keep possession, after the expiration of the term, until the covenant has been performed on the part of the landlord, but is not discharged from the payment of

a covenant running with the land, a purchaser of the estate will be bound by it, and the lessee's assignee may avail himself of it.<sup>1</sup>

§ 333. **When Void for Uncertainty.** — A covenant *to let* the premises to the lessee at the expiration of the term, without mentioning any price for which they are to be let; or to renew the lease on such terms as may be agreed upon; or, as is held by some courts, for such further time as lessee shall elect; or to renew upon the basis of a valuation of the premises as at the end of the lease, without any provision for determining that valuation, — in neither case amounts to a covenant for renewal but is altogether void, for uncertainty.<sup>2</sup> Nor will a general covenant *for renewal* be construed to imply a perpetual renewal; the most a lessor is bound to give on such a covenant is a renewal for one term only.<sup>3</sup> A covenant to

rent during his prolonged occupancy, see *Holsman v. Abrams*, 2 Duer, 485; *post*, § 533, note 6.

<sup>1</sup> *Piggot v. Mason*, 1 Paige, 412; *Barclay v. Steamb. Co.*, 6 Phila. 558; *Richardson v. Sydenham*, 2 Vern. 447; *Brook v. Bulkeley*, 2 Ves. Sr. 498; *Leppla v. Mackey*, 31 Minn. 75; 4 Kent, Com. 12th ed. \* 109. The good-will of a lease, which means a reasonable expectation of its renewal by the landlord, is an interest of value, which, as such, courts of equity will protect. Hence, a transfer of the good-will, when embraced in an assignment of the lease for value, is an essential part of the agreement of the parties, and as a valid contract necessarily implies that no act shall be done by the lessee to deprive his assignee of the benefit which the transfer was meant to secure to him. And if a lessee, after such a transfer and before the expiration of the term covered by the lease, secretly obtains from the landlord a renewal of the lease to himself, he violates, if not the letter, the intent and spirit of his contract. Such an act is a breach of good faith, involving a sacrifice of interests he was bound to protect; and a court of equity will not suffer him to hold any advantage so obtained, but will compel him to assign it. *Bennett v. Vansyckel*, 4 Duer, 462.

<sup>2</sup> *Abeel v. Radcliffe*, 13 Johns. 297; *Laird v. Boyle*, 2 Wisc. 431; *Pray v. Clark*, 113 Mass. 283; *West. Tr. Co. v. Lansing*, 49 N. Y. 499. And if the tenant remains in, a tenancy from year to year will be created. *Id.* In *Whetstone v. Davis*, 34 Ind. 510, there was a further term of two years at tenant's option, but with the extraordinary provisos, "if the farm was for rent, and the tenant suited the landlord, and they agreed on the rent." It is hardly necessary to say that this was void.

<sup>3</sup> *Whitlock v. Duffield*, Hoffm. Ch. 110; *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Cunningham v. Pattee*, 99 Mass. 248; *Moore v. Foley*, 6 Ves.

renew a lease "under the *same covenants* contained in the original lease" is satisfied by a renewal of the lease for another term, omitting the covenant to renew; for if the continued grant of successive leases and not a single renewal only had been intended, words, it was said, would naturally have been made use of indicating such an intention. A different construction would virtually lead to a grant in perpetuity; and where no consideration appears for a grant of so extensive a nature, such cannot be a reasonable construction.<sup>1</sup> Under certain circumstances, a grant of this character may not be unreasonable; but still in every case the intention must be expressed without ambiguity. It is said to be even better, for avoiding fraud, to suffer a party to escape out of a contract which he may have intended to make, than to enforce it upon a conjecture that such was the intent of the parties.<sup>2</sup>

§ 334. **To be strictly construed.**—A covenant which does not plainly imply or express a perpetual renewal, will not, as we have said, be construed to give this right. A covenant to

237; *Taylor v. Stibbert*, 2 *id.* 443; *Richardson v. Sydenham*, *supra*; *Iggulden v. May*, 9 Ves. 425; s. c. 7 East, 237. But a covenant to "renew and to continue to renew" is a covenant for a perpetual renewal. *Page v. Esty*, 54 Me. 319.

<sup>1</sup> *Carr v. Ellison*, 20 Wend. 178; *Richardson v. Sydenham*, *supra*; *Tritton v. Foote*, 2 Bro. Ch. 636; *Tracy v. Albany Exch. Co.*, 7 N. Y. 472; *Brend v. Frumveller*, 32 Mich. 215. A lease giving the lessee the privilege of additional years "if desired," and on notice one month before a time specified, continues on such notice being given for the additional term upon all the covenants and agreements of the former lease without the execution of any new lease. *House v. Burr*, 24 Barb. 525. Where a lease contained a covenant for a new lease at the expiration of the term, to contain "a like covenant for future renewals . . . as is contained in the present indenture," and a second lease was given with a covenant for a single renewal, and upon its expiration, a third, without any covenant for renewal, it was held, in an action to reform the two latter leases by inserting covenants which would secure the lessee a further term, that the lessee was not entitled to relief, upon the ground that the construction of the first lease contended for by the lessee would tend to create a perpetuity. *Syms v. Mayor, &c.*, 50 N. Y. S. C. 289.

<sup>2</sup> *Iggulden v. May*, *supra*; *Willan v. Willan*, 16 Ves. 84; *Baynham v. Guy's Hosp.* 3 *id.* 298; *Kirkham v. Chadwick*, 13 *id.* 549; *Harnett v. Yeilding*, 2 Sch. & L. 558; *Creighton v. McKie*, 2 Brewst. 383.

renew, in general terms, without specifying the particular period for which the renewal is to be made, — as, to grant such further lease as the lessee or his executors shall desire, — must therefore receive a reasonable construction.<sup>1</sup> If simply to renew at a specified rent, it carries none of the covenants of the old lease with it.<sup>2</sup> It has also been held, in a recent English case, that a covenant to renew from time to time, and to perfect, at the charge of the lessee, such other further assurance as the lessee should require, at such rents and under such covenants as were contained in said indenture of lease, was to be construed as a covenant for further assurance, and not for perpetual renewal.<sup>3</sup> But where a lease contained a covenant that the lessor would always, at any time when requested by the lessee, demise the premises for a further term of thirty-one years, in which new leases were to be contained the same rents, covenants, articles, clauses, provisos, and agreements, it was held that this amounted to a covenant for perpetual renewal.<sup>4</sup>

§ 335. **In the Alternative with other Covenants, — Effect of. —** Sometimes this covenant is in the alternative, either to renew or to pay the appraised value of the buildings to be erected by the lessee during his term; the appraisement in such case is considered in the light of an arbitration, and is final between

<sup>1</sup> Thus in England on a farming lease for five years, twenty-one years was held a reasonable period of renewal, because such was the usual period of terms. *Hyde v. Skinner*, 2 P. Wms. 196. “The meaning of this covenant,” said Ld. Ch. Macclesfield, “was that the lessee might be reimbursed the money he had laid out in improvements. But . . . he can only have a renewal for the usual term of twenty-one years. And though the lease is to be made on the same covenants, yet that shall not take in a covenant for the renewal of a new lease, forasmuch as then the lease would never end.” In America, however, as there is no usual period for leases, the renewal would be given for the same length as the original term.

<sup>2</sup> *Willis v. Aston*, 4 Edw. 504; *Ryder v. Jenny*, 2 Rob. 256.

<sup>3</sup> *Brown v. Tighe*, 8 Bligh, n. s. 272. (3)

<sup>4</sup> *Copper Min. Co. v. Beach*, 18 Beav. 478; *Blackmore v. Boardman*, 28 Mo. 420; *Page v. Esty*, 54 Me. 219; *Boyle v. Peab. H. Co.*, 46 Md. 623. And equity will enforce this right. *Id.*; *Banks v. Haskie*, 45 *id.* 207; and see *ante*, § 332, n. 1, and cases cited.

the parties as well as between their personal representatives.<sup>1</sup> The valuation is to be made as of the time of the expiration of the lease; and if the lessor refuses to appoint an arbitrator, the lessee cannot have an *ex parte* appraisement made, but must resort to his action on the covenant, and have his damages ascertained by a jury.<sup>2</sup> And where, in a building leased for twenty-one years, at a certain annual rent, it was covenanted that, at the expiration of the term, the buildings to be erected, and the improvements to be made by the lessee during the term, should be valued in the manner specified in the lease, and if the lessor should not abide by and pay the amount of such valuation, he should renew the lease or redemise the lot, at such rents and upon such terms as might be agreed upon between the parties; and at the end of the term, the lessee refused to accept a redemise of the lot upon any terms, and insisted upon being paid for his buildings and improvements, according to a valuation thereof made pursuant to the covenant in the lease; but the lessor tendered a renewal of the lease, for the same term and at the same rent, without any covenants as to buildings, or as to paying for buildings or improvements,—Chancellor Kent held that the lessee was bound to accept a renewal of the lease so tendered, or give up all claim to be paid for the buildings or improvements.<sup>3</sup> If a

<sup>1</sup> Van Cortland *v.* Underhill, 17 Johns. 405; Holliday *v.* Marshall, 7 *id.* 211; Renwick *v.* Renwick, 1 Bradf. 234; Crosby *v.* Moses, 48 N. Y. S. C. 146. The value is to be taken as of the time of the expiration of the lease. Berry *v.* Van Winkle, 2 N. J. Eq. 390; Speilmann *v.* Kliet, 36 *id.* 199. Where a lessee having been notified that the lessor had appointed an arbitrator under a covenant for a renewal, and being required to appoint one on his own behalf before the expiration of the lease, fails to do so, he does at the option of the lessor waive his right to such renewal; and if afterwards the lessor requires him to pay a specific rent, and he holds over, it may be regarded as a new letting from year to year, and not a renewal of the former lease; and the tenant may in such case be dispossessed by summary proceedings on non-payment of rent. If the lease is silent as to when the arbitrators are to be appointed, it means they shall be appointed a reasonable time before the expiration of the lease. Wells *v.* DeLeyer, 1 Daly, 39.

<sup>2</sup> Berry *v.* Van Winkle, 2 N. J. Eq. 390; Holliday *v.* Marshall, 7 Johns. 211; and see Whitlock *v.* Duffield, *supra*.

<sup>3</sup> Rutgers *v.* Hunter, 6 Johns. Ch. 215. In New York, the covenant to pay for improvements made by a lessee, during the continuance of his



tenant claims a right of renewal by force of a long-continued custom to renew, independent of any covenant to that effect, the mere fact of his having expended money in improving the estate will not give him a right to demand such renewal in a court of equity. There must be some covenant or agreement, or at least some arrangement with the tenant equivalent to an agreement, relative to the improvements, by which the landlord has encouraged him to proceed. Equity will then consider such an arrangement as an implied agreement that the tenant shall have the benefit of his expenditure, and will

term, is of frequent occurrence. The lessor of premises covenanted that if the lessee should erect a two-story dwelling-house, corresponding in elevation with a house already built on a part of the demised premises, he would, at the termination of the lease, pay for the building so erected, at a valuation to be made by appraisers. The tenant erected a building which did not correspond in height with the house referred to, and was not finished as a dwelling-house, although it was capable of being turned into one with little expense; the lessor made no objection, although he had full knowledge of the character of the building, and did not intimate that any question would be raised as to the lessee's right to be paid for the building as it stood. It was held that in the absence of fraud, or a waiver on the part of the lessor, inducing the lessee to depart from the terms of the covenant, the lessee could recover nothing for the building. *Pike v. Butler*, 4 N. Y. 360, reversing s. c. 4 Barb. 650. When, simultaneously with the execution of a lease for a term of years, an agreement is made whereby the landlord stipulates that, at the end of the term, he will renew the lease or pay for the buildings erected by the tenant, and at the end of the term he tenders a renewal, which the tenant refuses to accept, the landlord is entitled to recover possession without paying for the buildings. *Pearce v. Colden*, 8 Barb. 522. Where there was a fair effort on the part of the assignee of the lessee to have the improvements appraised, they were in fact valued before the expiration of the term, their value was ascertained and proved to the court, and the heirs had received the benefit of the improvements in the enhanced value of the property, the court held, in the exercise of its equitable powers, that the time of the stipulated appraisal was not so far essential to the substance of the contract as to destroy the claim for the value of the improvements. *Renwick v. Renwick*, *supra*. A lease provided that the lessor should not take possession until he had given thirty days' notice, and paid the value of the improvements made by the lessee, the value to be ascertained by two appraisers, each party to appoint one; the lessor was held to be entitled to possession after he had given the notice and tendered the value of the improvements, the lessee having refused to appoint an appraiser. *Conner v. Jones*, 28 Cal. 59.



interfere to prevent the landlord from putting an end to the tenancy.<sup>1</sup>

§ 335 *a.* **With Stipulation to Convey to Tenant.** — This covenant is sometimes varied by a stipulation to convey the premises to the lessee, at the end of the term, at a certain specified sum, if the lessor shall decline to pay for the improvements at their appraised value. In a case of this kind it was held that the assignee of a moiety of the premises might compel a performance of the contract, either by a suit in the name of all, or, if the others refuse to sue, in his own name, the court protecting the rights of all the parties.<sup>2</sup> But where a lessor covenanted that if the lessee should divide the premises into lots of certain dimensions, and the sub-lessees should erect buildings thereon of a certain description, then they should severally have the privilege of purchasing their lots at the end of the term, — it was held that the erection of a building partly on both lots, or buildings of an entirely different description

<sup>1</sup> Pilling v. Armitage, 12 Ves. 78. In Robertson v. St. John, 2 Bro. C. C. 140, Lord Thurlow held a promise by the landlord to renew a lease, in consequence of money already laid out by the tenant, to be *nudum pactum*, which equity would not perform in specie, although had he stated that intention, and the promise to renew had been founded upon it, the tenant should have had a specific performance. And see 1 Eq. Cas. Abr. 19. A covenant to pay at the end of the term for all the buildings and improvements that may be made on the land means, on a reasonable construction, to pay for such as are on the land at the end of the term. Van Rensselaer v. Penniman, 6 Wend. 569. An agreement to pay for all buildings and improvements to be erected by the lessee does not extend to ordinary repairs. Lametti v. Anderson, 6 Cow. 302. Where a lessor covenanted to renew or “to pay the value of such buildings as should be erected in pursuance of the lease,” and by the terms of the lease the lessee was to make the buildings fire-proof within two years, but the lessee failed to make the buildings fire-proof, — it was held that the covenant to pay could not be enforced. Fisher v. Fisher, 1 Bradf. 335. Although equity cannot specifically enforce a covenant to pay for the tenant’s improvements, at an appraisal to be made, yet where the landlords are trustees and not the original lessors, and refuse to renew, the court may decree payment from the buildings from the trust fund. Robinson v. Kettletas, 4 Edw. 67.

<sup>2</sup> Van Horne v. Crain, 1 Paige, 455; Ostrander v. Livingston, 3 Barb. Ch. 416.

on each, gave them no right to purchase.<sup>1</sup> In the absence of an agreement, the law imposes no obligation upon a landlord to pay the tenant for improvements he has made during his term; the tenant's right in respect thereto having never been extended further than to allow him to remove them before the expiration of his term.<sup>2</sup> And if he voluntarily quits possession of the premises before the expiration of the term, although at the request of the landlord, or if the landlord re-enters during the term for the non-payment of rent, the contract between the parties is ended and the lessee loses the value of his improvements, notwithstanding there may have been a stipulation in the lease providing for their appraisal at the end of the term and the payment of their value.<sup>3</sup>

§ 336. **Right of Renewal as a Distinct Interest. — Specific Performance.** — In the case of church leases, and of leases from trustees of a charity, where the lessors are in the practice of giving new leases to their tenants from time to time, upon the payment of a renewal fine, or a reasonable addition to the rent, the tenant, in regard to third persons, has been

<sup>1</sup> *Ostrander v. Livingston*, *supra*. A lessee of a house granted a sub-lease thereof, in which he covenanted that if he should at any time obtain an extension of the term, or a renewal of the lease, he would grant an extension or renewal of the sub-lease for the same period. A renewal of the lease was taken in the name of a trustee for the wife of the lessee for her separate use. Held, that the lessee was under no obligation to endeavor to procure the renewal to himself, and that the question was whether the trustee was in reality trustee for the lessee or for his wife; and that in the former case the parties to the record would be bound by the lessee's covenant, and the sub-lessee would be entitled to a renewal, but in the latter case he would not. *Lumley v. Timms*, 28 L. T. N. S. 608. If several persons are interested in a lease which is about to expire, and one of them undertakes to procure a renewal, but takes it in his own name, it will be held to enure for the benefit of all. *Burrell v. Buel*, 2 Sandf. Ch. 15.

<sup>2</sup> *Kutter v. Smith*, 2 Wall. 491; *Gay v. Joplin*, 4 McCrary, 459; *Wilkinson v. Farnham*, 81 Mo. 672; *Dun v. Bagby*, 88 N. C. 91; *Wilson v. Scruggs*, 7 Lea, 635.

<sup>3</sup> *Lawrence v. Knight*, 11 Cal. 208; *Gudgell v. Duval*, 4 J. J. Marsh. 229; and see *Smith v. Brown*, 5 Rich. Eq. 291. An entry under a license, and an occupation for more than fifteen years, give the party a right to be reimbursed for the value of his erections. *Pope v. Heeny*, 24 Vt. 560.

held to possess a vendible interest in such imperfect right of renewal, which a court of equity will recognize and protect, although such renewal depends upon the mere volition of the lessors. And if a person who has a particular or special interest in such a lease obtains a renewal of it, in consequence of his being in possession as tenant, or from his having such special interest, the renewed lease is in equity to be considered as a continuance of the original lease, for the protection of the rights of all parties who had any legal or equitable interests in the old lease.<sup>1</sup> And, therefore, where a complainant, as the lessee of premises part of which had been let by him to an under-tenant, contracted with the defendants to sell his interest in the premises to them, for the purpose of enabling them to obtain a renewal, without prejudice to the rights of the sub-lessee, and the defendants, in consequence of such agreement, obtained a new lease of the premises in their own names, and then evicted the sub-lessee, by which the complainant was compelled to make good the loss or damage sustained by him,—it was held that the complainant was entitled to a specific performance of the agreement, and to be indemnified against the claim of the sub-lessee; and that he had a lien for the unpaid purchase-money upon the legal interest in the premises which the defendants had acquired under their new lease.<sup>2</sup>

§ 337. **Specific Performance of Covenant, when Decreed.**—Insolvency,<sup>3</sup> or the commission of a felony, on the part of the covenantor,<sup>4</sup> will generally suffice to prevent a decree for the

<sup>1</sup> *Mitchell v. Read*, 61 Barb. 310.

<sup>2</sup> *Phyfe v. Wardell*, 5 Paige, 268; *Anderson v. Lemon*, 8 N. Y. 236. A mortgagee is entitled to similar protection. *Gibbes v. Jenkins*, 3 Sandf. Ch. 130. Where one of several joint tenants obtains a renewal to himself alone, it will enure to the benefit of all. *Burrell v. Bull*, 3 Sandf. Ch. 15; *James v. Dean*, 11 Ves. 383; s. c. 15 *id.* 236; *Featherstonhaugh v. Fenwick*, 17 *id.* 298; *Pickering v. Vowles*, 1 Bro. C. C. 197; *Mulvany v. Dillon*, 1 Ball & B. 409.

<sup>3</sup> *Buckland v. Hall*, 8 Ves. 92; *Featherstonhaugh v. Fenwick*, *supra*; *De Minckwitz v. Udney*, 16 *id.* 466; *Hyde v. Skinner*, 2 P. Wms. 196; *O'Herlihy v. Hedges*, 1 Sch. & L. 123.

<sup>4</sup> *Willingham v. Joyce*, 3 Ves. 169.

specific performance of a covenant of renewal. Nor will the court enforce performance where a tenant has committed waste, treated the land in an unhusbandlike manner, or been guilty of a breach of covenant for which the lessor has a right of re-entry;<sup>1</sup> nor in cases where the agreement to renew has been accompanied by fraud or misrepresentation,<sup>2</sup> or the tenant has already been guilty of wilful breaches of a covenant which was agreed to be inserted in the new lease.<sup>3</sup> But a surrender and conveyance to the lessor, of an under-lease, is no bar to a claim on the part of the lessee or his assigns, for a renewal of the original lease, according to the covenant.<sup>4</sup> And if a tenant assigns his contract to a third solvent party, and afterwards becomes bankrupt or insolvent, the court will decree a specific performance against the landlord, in favor of such third party.<sup>5</sup> Injuries accruing to the landlord by the acts of a tenant, but which do not amount to a breach of covenant, form no ground for refusing a decree for the specific performance of the contract; and, therefore, where the tenant, under an agreement for a building-lease, had built a brew-house, which injured the value of the landlord's other property in the neighborhood, there being no covenant in the lease against building a brew-house, the court decreed performance, — saying, that if the erection became a nuisance, the defendant had a remedy at law.<sup>6</sup> And where the covenant to renew is an independent one, the fact that the lessee was in arrear to the lessor for rent upon another covenant contained in the lease, did not excuse its performance.<sup>7</sup>

§ 338. *Without Consideration, or Inequitable; Specific Performance of, refused.* — As every contract depends upon the consideration for its validity, it is necessary that there be a

<sup>1</sup> *Hill v. Barclay*, 18 Ves. 63; *Gourlay v. Duke of Somerset*, 1 Ves. & B. 68; *Lovat v. Ranelagh*, 3 id. 29; *Gannett v. Albree*, 103 Mass. 372.

<sup>2</sup> *Pendred v. Griffith*, 1 Bro. P. C. 314; *Willingham v. Joyce*, *supra*.

<sup>3</sup> *Hill v. Barclay*, 18 Ves. 63.

<sup>4</sup> *Piggot v. Mason*, 1 Paige, 412.

<sup>5</sup> *Crosbie v. Tooke*, 1 Mylne & K. 431; *Morgan v. Rhodes*, 1 Mont. & A. 214.

<sup>6</sup> *Gorton v. Smart*, 1 Sim. & S. 66.

<sup>7</sup> *Tracy v. Albany Exch. Co.*, *supra*; 5 B. & A. 584.

sufficient and reasonable consideration, on the part of the lessee, to support this covenant; for if an agreement for a renewal be unequal, unjust, or inserted by mistake, a specific performance will not be decreed. A bill was filed on a covenant for the renewal of a leasehold estate, of the yearly value of £130, at a fine of £3, by an addition of ten years; but as there was no adequacy of price for this renewable perpetuity, no onerous services on the part of the lessee, no money advanced, and no improvement made, the bargain was considered so hard and injurious that the bill was dismissed.<sup>1</sup> For a similar reason, a voluntary agreement indorsed on a lease after its execution by one not a party to it, but only a remainder-man, will not bind him to the performance of a covenant for renewal, contained in such a lease.<sup>2</sup> So a promise by letter to renew a lease, in consequence of money already expended on the premises, is a void promise, being founded upon a past consideration, which equity will not enforce. Nor will the laying out of money afterwards, if it is voluntary, vary the case; but where the promise was founded on a previously expressed intention of spending money for a particular purpose, which was not objected to, a specific performance was decreed.<sup>3</sup>

§ 339. **Lessee's legal or equitable Remedy.**—**Remedy barred by Laches.**—When a lessee is entitled to a renewal and the

<sup>1</sup> *Redshaw v. Bedford Level*, 1 Eden, 343.

<sup>2</sup> *Dowling v. Mill*, 1 Madd. 541.

<sup>3</sup> *Robertson v. St. John*, 2 Bro. C. C. 140; *Richardson v. Sydenham*, *supra*. Where the lease provided for periodical renewals the rent for each period to be fixed by arbitrators, and the lessor fraudulently sought to evade his contract by refusing to appoint an arbitrator, and sued the lessee for use and occupation, it was held, per Dillon, J., that equity would stay the lessor's suit, until the lessor should appoint an arbitrator; notwithstanding the doctrine that equity will not enforce a specific performance of an agreement to arbitrate. *Tscheider v. Biddle*, 4 Dill. 55. Where a lease provided for the erection of a building on the premises by the lessee and for the lessor's election at the end of the term to renew, or buy the building, or to sell the premises at a price to be fixed by arbitration, and the lessor failed to elect, it was held that the lessee might then elect and have equitable relief to enforce his election. *Coles v. Peck*, 96 Ind. 333.

landlord refuses to renew, the lessee has a right to elect whether he will proceed at law for damages, or in equity for specific performance.<sup>1</sup> But if he is guilty of laches in demanding a renewal, equity will not, in general, aid him.<sup>2</sup> Circumstances may, in particular cases, excuse the laches; but generally the lessor will not continue to be bound by his covenant, where the lessee has neglected to perform the conditions with which it was coupled. There would be no mutuality in such dealing, if it were left to the option of the lessee alone, to enforce the contract when he pleased, but to leave himself free as long as he found it convenient.<sup>3</sup> The court will only interfere beyond the stipulations of a covenant where a literal performance has been prevented by unavoidable accident, fraud, surprise, or ignorance not wilful, and upon compensation being made, and no injury done to the lessor.<sup>4</sup> Accordingly, where an original lessee, under a demise which contained a covenant for renewal, died, and the instrument came into the possession of his executor, who was ignorant of the covenants contained in the lease, or that his testator was one of the lives named therein, until apprised of it by his solicitor,—the court were of opinion that such ignorance of the contents of the lease did not entitle the plaintiff to seek relief in a court of equity, or absolve him

<sup>1</sup> *Arnot v. Alexander*, 44 Mo. 25.

<sup>2</sup> *Eaton v. Lyon*, 3 Ves. 690; *McAlpine v. Swift*, 1 Ball & B. 285. But mere delay, after completing an agreement for an extension, before legally enforcing it, though long continued, is no laches if the landlord is not prejudiced thereby. *Ryder v. Robinson*, 109 Mass. 67. Where a lessee had a vested interest of large value in improvements made under a lease which gave him a right of renewal on his giving a specified notice, it was held that he might be relieved in equity from his failure, by reason of mistake or accident, to give such notice in season, he not being guilty of laches. *N. Y. Life Ins. & Trust Co. v. Rector, &c.*, 12 Abb. N. C. 50.

<sup>3</sup> *London v. Mitford*, 14 Ves. 41. A lease for five years contained a covenant to renew for another five years, if it should be desired by the lessee; the court held that the lessee was bound to declare his election as to renewal before the expiration of the original term, and that having neglected to do so until two days afterwards, equity would not interfere for his relief. *Renoud v. Daskam*, 34 Conn. 516.

<sup>4</sup> *Eton v. Lyon*, *supra*; *Baynham v. Guy's Hosp.*, 3 Ves. 295; *Rawstorne v. Bentley*, 4 Bro. C. C. 415; but see *Maxwell v. Ward*, 11 Price, 16, the opinion of Lord C. B. Richards.

from the effect of omitting to apply for a renewal in time.<sup>1</sup> So when it appeared that the assignee of the lease did not know of the death of the *cestui que vie*, but accounted for his ignorance on the ground that the description in the lease, of the residence and trade of the person referred to, did not correspond with his actual residence and trade at the time of his decease; and, therefore, though the owner of the lease knew of the death of this person, he was mistaken as to his identity, and immediately upon his receiving information on the subject applied for a renewal,—the Master of the Rolls, Sir J. Leach, thought that these circumstances did not entitle the plaintiff to relief in equity, upon the principle that a lessee was bound to inform himself correctly as to the lives, and to make his application within the prescribed period.<sup>2</sup> But in general, a renewal will be ordered where there has been a substantial performance of the condition upon which the renewal was to be granted, and no injury has been done to the other party.<sup>3</sup>

§ 340. **Renewed Lease, Effect of.**—The legal effect of taking a new lease is a surrender of the old one; but a renewed lease is to be considered as a continuance of the original lease, for the protection of all legal interests carved out of it, which, when once well created, the law does not permit to be destroyed.<sup>4</sup> It was therefore formerly considered necessary to

<sup>1</sup> *Maxwell v. Ward*, 13 Price, 676.

<sup>2</sup> *Harris v. Bryant*, Rolls, 10 Dec. 1827, cited Platt on Covenants, 268.

<sup>3</sup> *Reed v. St. John*, 2 Daly, 213. Where the lessor covenanted to renew on lessee's paying the rent and performing and observing the covenants in the lease, it was held after elaborate discussion that the performance of the lessee's covenants was a condition precedent to the right of renewal. *Bastin v. Bidwell*, 18 Ch. D. 238.

<sup>4</sup> *Collett v. Hooper*, 13 Ves. 260. Where new leases are regarded as a continuance of the original term, as in the case of church leases, a mortgage of the leasehold premises attaches to a continuance of the lease. *Gibbes v. Jenkins*, 3 Sandf. Ch. 130. The acceptance by a lessee of a renewal of the lease is no satisfaction of a breach of the lessor's covenant; for example, his covenant for quiet enjoyment. *Lord v. Vreeland*, 15 Abb. Pr. R. 122. So the continued tenancy by lessee's election is no surrender, but the obligations of all the covenants in the lease remain. *House v. Burr*, 24 Barb. 525.



obtain the concurrence of all the under-lessees to a surrender of their existing interests, in order to obtain a renewal of the principal lease, and such renewal might have been prevented or delayed by the refusal of one under-tenant to surrender his lease; and if there was no covenant in the under-lease to that effect, the court possessed no power to compel the under-tenant to surrender.<sup>1</sup> But the statute 4 Geo. II. c. 28, § 6, from which the section of the New York Revised Statutes before mentioned is taken, provided a remedy for such inconveniences, by enacting that, in case any lease shall be surrendered, in order to be renewed, the renewal shall be good and valid to all intents and purposes, without a surrender of any of the under-leases derived out of the original lease, allowing all the parties, however, to enjoy their rights and remedies in the same manner and to the same extent as if the original lease still continued.

## SECTION VI.

### THE COVENANT TO PAY TAXES AND ASSESSMENTS.

§ 341. **By Landlord, implied, — Tenant may pay Taxes, &c., to protect himself.** — Another obligation which the law imposes upon a landlord, when the lease or statute imposing the tax is silent upon the subject, is the payment of all state, city, and county taxes and assessments, which during the term may become chargeable upon the premises, — as well as of any ground-rent which the property may be subject to.<sup>2</sup> An

<sup>1</sup> Colchester v. Arnett, 2 Vern. 383.

<sup>2</sup> Taylor v. Zamira, 6 Taunt. 524; Carter v. Carter, 5 Bing. 409; Stubbs v. Parsons, 3 B. & A. 516; Watson v. Atkins, *id.* 647; McFarlane v. Williams, 107 Ill. 33. A tax is a burden or charge imposed in respect of the ownership of property; and when this is under demise, the landlord is still liable because he receives the equivalent in rent. But the express language of the statutes and the construction of courts, based on the permanent or temporary character of the charge, has in many cases thrown the burden on the tenant. See *post*, §§ 395 *et seq.* An assessment for a supposed benefit is not a tax. *Amenia v. Stanford*, 6 Johns. 92; *Sharp v.*

express agreement is sometimes introduced into the lease, by which this obligation is shifted, and the tenant undertakes to pay them;<sup>1</sup> but without such an agreement the tenant may discharge them, and deduct what he is obliged to pay out of the rent; for the general rule is, that the immediate landlord is bound to protect his tenant from all paramount claims. When, therefore, a tenant has been compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent, whether due or to become due.<sup>2</sup> The landlord sometimes covenants to pay a certain portion of such charges; but, according to the English cases, he is chargeable only in proportion to the rent he receives. And where he covenanted to pay taxes, and the premises were taxed at £150, and he received only £120 for rent, the covenant was held to be satisfied by the payment of the tax at the rate of £120.<sup>3</sup> If he expressly covenants to pay all taxes charged or to be charged upon, or in respect of the land during the continuance of the term, and gives the lessee permission to build on the land, who subsequently builds, and thereby increases the annual value of the premises and with it the amount of the taxes, the landlord will be bound to pay taxes only in proportion to the value of the land without the build-

Speir, 4 Hill, 76. But the rule in the text applies only where the lease is for years. Tenant for life is bound for taxes, and similar annual burdens. *Prettyman v. Walston*, 34 Ill. 191, and *ante*, § 318, and notes.

<sup>1</sup> It is held that such a covenant does not bind the lessee to repay to the lessor a penalty paid by the latter in order to redeem the land from a tax sale. *Webster v. Nichols*, 104 Ill. 160.

<sup>2</sup> *Graham v. Allsopp*, 3 Exch. 186; *Jones v. Morris*, *id.* 742; *McPherson v. Atl. & Pac. R. R. Co.*, 66 Mo. 103. By Mass. Pub. Stat. c. 11, § 17, the tenant paying taxes may recover them of the landlord unless there be an agreement to the contrary. The tenant may purchase at a tax sale and set up his adverse title as a defence to an action for rent. *Waggener v. McLaughlin*, 38 Ark. 195; *Weichselbaum v. Curlett*, 20 Kan. 709.

<sup>3</sup> *Yaw v. Leman*, 1 Wils. 21. A covenant by the landlord to pay the land tax binds him only to pay land tax in proportion of rent. *Whitfield v. Brandwood*, 2 Stark. 388; and see *Watson v. Atkins*, 3 B. & A. 647.

ing, and the tenant must make up the balance for the improved value.<sup>1</sup>

§ 342. **Landlord's Liability to reimburse Tenant for Payments.** — The obligation of the landlord to pay all public charges against the property, except such as the tenant has expressly undertaken to pay, renders him liable to reimburse the tenant for all such payments as the tenant has been obliged to make, in order to protect his goods, or the property leased, from other demands of the public collector.<sup>2</sup> But on a lease for years, rendering a fixed sum for rent, *free and clear from* all manner of taxes, charges, and impositions whatsoever, the lessor is entitled to receive the whole rent, without any deduction for taxes, or charges of any description.<sup>3</sup> And where the goods of an out-going tenant, left by him on the farm, were distrained for a tax payable by the tenant in whose time it became due, and who received the benefit of the improvement, and which the statute gave him power to deduct from his rent, — the court held that, as the tax must ultimately fall on the landlord, and the tenant had been compelled to pay it in order to ransom his goods, he might recover the amount from the landlord as money paid to his use.<sup>4</sup>

<sup>1</sup> *Watson v. Home*, 7 B. & C. 285.

<sup>2</sup> *Spencer v. Parry*, 3 Ad. & E. 331. *Lubbock v. Tribe*, 3 M. & W. 607.

<sup>3</sup> *Giles v. Hooper*, Carth. 135; *Brewster v. Kidgil*, 1 Salk. 198; s. c. 1 Ld. Ray. 317.

<sup>4</sup> *Dawson v. Linton*, 5 B. & A. 521. In New York, the interest of a lessee of real estate is taxable as real property, notwithstanding that, as between heirs and executors, it is, by 2 R. S. 88, § 6, personal property. *Trustees v. Dunn*, 22 Barb. 402. Such a tax would not of course fall upon the landlord. And see *ante*, §§ 14, 50. But rents due upon leases for twenty-one years are taxable as the personal estate of the landlord, under the New York law of 1846 *to equalize taxation*, and such rents continue to be taxable until the end of the term, although, at the time of laying the tax, such leases have but a few years to run. And a landlord cannot evade this liability by setting up an agreement between himself and his tenant that a new lease shall be executed for the unexpired term. *Livingston v. Hollenbeck*, 4 Barb. 9; *Le Conteulx v. Sup. of Erie Co.*, 7 Barb. 249; *Buffalo v. Le Conteulx*, 15 N. Y. 451. Nor is there any difference, in this respect, between agricultural and city property; or whether the tax is levied for city, county, or State purposes. *Id.*

## CHAPTER IX.

## COVENANTS ON THE PART OF THE LESSEE.

## SECTION I.

## OF THE COVENANT TO REPAIR, AND HEREIN OF WASTE.

§ 343. *How far Implied.* — Independently of any express agreement on the part of a tenant, and in the absence of the landlord's undertaking to keep the premises in repair, the law imposes upon every tenant, whether for life or for years, an obligation to treat the premises in such a manner that no substantial injury shall be done to them; and so that they may revert to the lessor at the end of the term unimpaired by any wilful or negligent conduct on his part.<sup>1</sup> A tenant for years, or from year to year, must therefore keep the premises wind and water tight;<sup>2</sup> and is bound to make fair and tenantable repairs, such as the keeping of fences in order, or replacing doors and windows that are broken during his occupation.<sup>3</sup> If it is a furnished house, he must take care of the furniture, and leave it with the linen, etc., clean and in good order.<sup>4</sup> But he is not bound to rebuild premises which have accidentally become ruinous during his occupation, unless he is under

<sup>1</sup> *U. S. v. Bostwick*, 94 U. S. 53; *Miller v. Shield*, 55 Ind. 71.

<sup>2</sup> *Ulrich v. McCabe*, 1 Hitt. 251; *Kastor v. Newhouse*, 4 E. D. Smith, 20; *Pasteur v. Jones*, 1 Daly, 178; *Auworth v. Johnson*, 5 C. & P. 239; *Leach v. Thomas*, 7 *id.* 327; *Parrott v. Barney*, Deady, 405.

<sup>3</sup> *Cheetham v. Hampson*, 4 T. R. 318; 18 Ves. 331; *Hitner v. Ege*, 28 Pa. St. 305; *Ferguson v. —*, 2 Esp. 590. See *ante*, § 330, note; and *post*, § 375, note.

<sup>4</sup> *White v. Nicholson*, 4 M. & G. 95; *Stanley v. Agnew*, 12 M. & W. 827.

a covenant to rebuild.<sup>1</sup> Neither is he liable for the ordinary wear and tear of the premises;<sup>2</sup> nor answerable if they are accidentally burnt down; nor bound to rebuild a fallen chimney; or replace doors and sashes worn out by time; to put a new roof on the building; or to make similar substantial and lasting repairs, such as are usually called general repairs.<sup>3</sup> Nor is he bound to do painting, whitewashing, or papering, which are mere matters of ornament (unless they are necessary to preserve exposed timber from decay), even though he be under a covenant to leave the premises "in good and sufficient repair, order, and condition."<sup>4</sup>

§ 344. **In Farming Leases.**—As to farming leases, a tenant is also under a similar obligation to repair, but it differs from his liability to repair houses in this respect, that it extends only to the dwelling-house occupied by the tenant; the burden of repairing the out-buildings and other erections on the farm, being sustained either by the landlord or the tenant (in the absence of any express provision in the lease), according to the particular custom of the country in which the farm is situated. The tenant is, however, always bound to keep the soil in a proper state of cultivation; and to preserve the timber and ornamental trees in good order, if there be any growing on it.<sup>5</sup> The bare relation of landlord and tenant is a

<sup>1</sup> *Auworth v. Johnson*, *supra*; *Bullock v. Dommitt*, 6 T. R. 650; *U. S. v. Bostwick*, *supra*. See *Merryman v. Shipley*, 46 Md. 79.

<sup>2</sup> *Torriano v. Young*, 6 C. & P. 8.

<sup>3</sup> *Leach v. Thomas*, *supra*; *Doe v. Amey*, 12 Ad. & E. 476; *Horsefall v. Mather*, Holt, 7; *Eagle v. Swazye*, 2 Daly, 140; *Brown v. Crump*, 1 Marsh. 567. Such as renewing the floor of a stable. *Johnson v. Dixon*, 1 Daly, 178.

<sup>4</sup> *Wise v. Metcalfe*, 10 B. & C. 299. There is no implied contract to use the premises in a tenantlike manner, where there is an express covenant to repair contained in the lease; for *expressum facit cessare tacitum*. *Standen v. Christmas*, 10 Q. B. 135. The leaving of nine cart-loads of ashes, brickbats, and rubbish by a tenant on quitting the demised premises, is no breach of his covenant to peaceably yield up the premises in good tenantable repair. *Thorndike v. Burrage*, 111 Mass. 531.

<sup>5</sup> *Herne v. Bembow*, 4 Taunt. 764; Co. Lit. 53. To till a farm contrary to the established rotation of crops on it, and contrary to the usage of that part of the country in which it is situated, constitutes waste. *Wilds v. Layton*, 1 Del. Ch. 226.

sufficient consideration for a promise by the tenant to treat the farm in a husbandlike manner, and to keep the fences in repair, as well as to cultivate the lands according to the custom of the country; though not for a promise to repair, or to spend a certain amount annually for manure.<sup>1</sup> And in an action against a tenant, upon promises that he would occupy the farm "in a good and husbandlike manner, according to the custom of the country," an allegation that he had treated the estate "contrary to good husbandry and the custom of the country," was proved by showing that he had used it contrary to the prevalent course of husbandry in that neighborhood; as, by tilling half his farm at once, when no other farmer there tilled more than a third, though many tilled only a fourth.<sup>2</sup> And it is unnecessary to show any definite custom or usage in respect to the quantity tilled. All these duties fall upon a tenant without any express covenant on his part; and a breach of them will, in general, render him liable to be punished for waste, without regard to the person by whom the act of waste may be committed; for it has been held, since the time of Lord Coke, that a tenant, whether for life or for years, must answer for waste done by a stranger, and must take his remedy over.<sup>3</sup>

§ 345. **Waste. — Voluntary or Permissive. — Particular Acts of.** — Waste is usually defined to be a spoil or destruction in houses, lands, or tenements, to the damage of him who is in reversion or remainder;<sup>4</sup> and it may be either *voluntary or*

<sup>1</sup> *Brown v. Crump*, 1 Marsh. 567; s. c. 6 Taunt. 300; *Powley v. Walker*, 5 T. R. 373; *Tempest v. Rawling*, 13 East, 18; *Cheetham v. Hampson*, *supra*; *Walker v. Tucker*, 70 Ill. 527, 534.

<sup>2</sup> *Legh v. Hewitt*, 4 East, 154; *Dalby v. Hirst*, 3 Moore, 536. To cultivate land in a workmanlike manner, means to cultivate it in a farmer-like manner, or as good farmers usually do. *Aughinbaugh v. Coppenheffer*, 55 Pa. St. 347.

<sup>3</sup> Lord Mansfield, in *Taylor v. Whitehead*, 2 Doug. 745; *Attersoll v. Stevens*, 1 Taunt. 198, and per Beardsley, J., in *Cook v. Champ. Tr. Co.*, 1 Den. 104. As to the history of the action of waste, see *post*, § 686 *et seq.*

<sup>4</sup> But it cannot arise from the use of the premises in a reasonable and proper manner, as where a grain warehouse was stored with grain in a proper way, by reason of which a floor gave way. *Saner v. Bilton*, 7 Ch. D., 815; *Manchester Bond. Warehouse Co. v. Carr*, 5 C. P. D. 507.

*permissive*. It is *voluntary* where the tenant does some positive injury to the premises, as by pulling down or destroying a house, ploughing up a flower-garden, or the like; and *permissive* when he neglects to do what might have prevented the waste, — as, by suffering a house to fall down or decay for want of repair. And it may be incurred in respect to the soil, as well as to buildings, trees, fences, or live-stock on the premises.<sup>1</sup> It is a general principle, says Chief Justice Savage, that the law considers every thing to be waste which does a permanent injury to the inheritance; and, therefore, where the value of the land consists principally in hemlock timber growing upon it, the act of cutting such timber and peeling the bark, when the cutting is not necessary and proper for the purpose of cultivation, will be considered waste.<sup>2</sup> To open new mines in land which has been demised without making mention of mines,<sup>3</sup> to dig and carry away the soil, dig clay, open gravel-pits, and the like (unless for the repair of the premises), are instances of voluntary waste, because these things do an injury to the inheritance.<sup>4</sup> So is it also to cut timber; to use the soil for making brick; to change the face of the soil

<sup>1</sup> Co. Lit. 53, b; 2 Roll. Abr. 816, l. 15; U. S. v. Bostwick, 94 U. S. 58; Derixson v. State, 65 Ind. 385. Voluntary waste consists in doing something which the tenant is prohibited by law from doing; while permissive waste allows something to happen which he is bound by law to prevent. The one is an offence of commission, the other of omission.

<sup>2</sup> People v. Alberty, 11 Wend. 162; Jackson v. Bronson, 7 Johns. 227. In an action to recover damages for waste, the jury are to inquire how far the acts complained of have injured the plaintiff's estate and inheritance. Harder v. Harder, 26 Barb. 409. That the test of waste is not injury to the premises, but disherison of the reversion, see Livingston v. Reynolds, 26 Wend. 115; Kidd v. Dennison, 6 Barb. 9.

<sup>3</sup> See Harlow v. Lake Sup. Iron Co., 36 Mich. 105; Eley's Appeal, 103 Pa. St. 300.

<sup>4</sup> Livingston v. Reynolds, 2 Hill, 157; Coates v. Cheever, 1 Cow. 460; Saunders's Case, 5 Co. 12, a; 22 Vin. Abr. 439; U. S. v. Bostwick, *supra*. When the law defines waste to be whatever does a lasting damage to the freehold or inheritance, it does not mean that it is to be left to a jury to determine, according to the opinions of witnesses, whether the act complained of causes such damage; for certain acts are in contemplation of law injurious *per se* to the inheritance, and the only subject of inquiry for the jury is whether such acts have been committed. McGregor v. Brown, 10 N. Y. 114.



by converting arable land into pasture, or pasture land into arable; to turn garden ground into tillage; to sow grain in hop grounds; to plough up strawberry beds; and, in short, to essentially vary, in any manner, the quality of the soil, or the nature of its produce; for it not only changes the course of husbandry, but the landlord is thereby in danger of losing evidence of the identity of his property.<sup>1</sup>

§ 346. **Waste.** — **Consists in first Opening of Soil.** — **Tends to destroy the demised Property.** — **Examples.** — But the offence is said to consist in the first penetration and opening of the soil; and, therefore, it is not waste to continue to dig in mines or pits already open, and which have become part of the annual profit of the land. And if mines, pits, &c., be expressly named in the lease, so as to show an intention that the lessee should have the benefit of their produce, it will not be waste for him to open them.<sup>2</sup> Or where clay or marl are taken from the soil, for the purpose of repairing the buildings or improving the land, this will not be waste.<sup>3</sup> Neither will it be so considered to dig trenches to carry off water, or to cut turf for actual use.<sup>4</sup> But anything tending to the *destruc-*

<sup>1</sup> *Livingston v. Reynolds*, 26 Wend. 122; *Watherell v. Howells*, 1 Camp. 227; *Sarles v. Sarles*, 3 Sandf. Ch. 601; *Shipley v. Ritter*, 7 Md. 408; *Clement v. Wheeler*, 25 N. H. 361; *Queen's Coll. Oxford v. Hallett*, 14 East, 489, 2 Roll. Abr. 815; *Harrow School v. Alderton*, 2 B. & P. 86. Besides, the tenant has no authority to assume the right of judging what may be an improvement to the inheritance; but must confine himself to the conditions of his lease. Per Paige, J., in *Kidd v. Dennison*, *supra*.

<sup>2</sup> *Crouch v. Puryear*, 1 Rand. 258. *Saunders's Case*, 5 Co. 12. It was further decided in this case, that if the land be leased in which there is a hidden mine, and the lessee opens it, and then assigns over his estate, the assignee cannot dig in it; and if the lessee in such case assigns his term with an exception of the profits of the mines, or the mines themselves, or of the timber, trees, &c., the exception is void. *Doe v. Wood*, 2 B. & A. 724. Upon the principle of *Saunders's Case*, it has been held in Maryland that the opening of a new mine is waste. *Owings v. Emery*, 6 Gill, 260. This case also held that a lease of a lot of ground, without any reference to mines or quarries, was simply a grant of the superficies of the soil.

<sup>3</sup> *Moyle v. Mayle*, Owen, 66.

<sup>4</sup> 2 Roll. Abr. 820, l. 23; Co. Lit. 53, b; *Lord Courtown v. Ward*, 1 Sch. & L. 8.

tion of the subject of the demise is waste, — as, if the lessee cuts down pear, apple, or other fruit-trees; or they are blown down by tempest, and he afterwards roots them up, or cuts down the growing germins, without planting new.<sup>1</sup> So if he destroys, or suffers the stock of a dovecot, warren, park, or fish-pond to be diminished, so that there is not such sufficient store left as he found when he came in.<sup>2</sup> And if he voluntarily puts repairs upon the premises, he cannot afterwards displace and remove them without committing waste.<sup>3</sup>

§ 347. **Specific Acts of Waste.** — If the tenant suffers the land to be overflowed, or surrounded by water, through his negligence in permitting the embankments to fall into decay, he will be chargeable with permissive waste to the soil; but if the overflow or other injury be caused by a tempest, he will not be answerable for the accident, unless he omits to repair the damage.<sup>4</sup> If a house be destroyed by tempest, fire from lightning, or the like, which is the act of Providence, it is not waste,<sup>5</sup> for *actus Dei nemini facit injuriam*. Yet it becomes so if the damage done by the tempest was occasioned by the tenant's previous neglect to repair, or if he does not forthwith proceed to repair.<sup>6</sup> But if the house was in a ruinous condition when the tenant came in, and he pulls it down, it will still be waste, unless he builds it up again.<sup>7</sup> And if glass windows (although glazed by the tenant himself) be broken or carried away, it is waste; for the glass is part of the house, and the tenant must, at his peril, keep the house from wasting. Waste may also be done in respect to animals; which happens by taking or destroying so many of them as to

<sup>1</sup> 2 Roll. Abr. 817, l. 35; Co. Lit. 53 a; Lashmer v. Avery, Cro. Jac. 126; U. S. v. Bostwick, *supra*.

<sup>2</sup> Co. Lit. 53, a; 2 Inst. 304.

<sup>3</sup> Caldwell v. Enkas, 2 Mill. Const. 348.

<sup>4</sup> Griffith's Case, Moore, 62; Co. Lit. 53, b; Reg. v. Leigh, 10 Ad. & E. 398.

<sup>5</sup> Co. Lit. 53, a. But if the house was burnt by the tenant's negligence, it is still waste. Co. Lit. 53, b. Or if the roof were blown off, it would be waste unless he repaired it in a reasonable time. 2 Roll. Abr. 820; U. S. v. Bostwick, *supra*.

<sup>6</sup> Moore, 62; Viner's Abr. Waste (1).

<sup>7</sup> Co. Lit. 53, a.

unstock the dove-cot, warren, park, or fish-pond, in which they are kept;<sup>1</sup> or if the tenant stops the pigeon-holes, so that the pigeons cannot build, or suffers the park paling to be decayed, so that the deer stray away and are lost.<sup>2</sup>

§ 348. **Voluntary Waste, what. — Examples.** — Voluntary waste to buildings at common law occurs, not only where they are deliberately pulled down or unroofed, but also where one kind of building is altered into another, even though it may be thereby improved in value; as, for instance, to alter a corn-mill into a fulling-mill; a dwelling-house into a store;<sup>3</sup> or a hall into a stable;<sup>4</sup> throwing two rooms into one;<sup>5</sup> pulling down the house and rebuilding it upon a greater or less scale than before; or to convert a brew-house, which let for £120 per annum, into dwelling-houses, which let for £200 per annum; because, as it was said, of the alteration of the nature of the thing, and of the evidence.<sup>6</sup> Besides which, it might have the effect of casting an additional obligation on the reversioner, which he might not consider an improvement. It was therefore held to be incompatible with his landlord's interest for a tenant to make any such alterations, unless he was justified by his express permission.<sup>7</sup> But this strict-

<sup>1</sup> *Vavasor's Case*, 2 Leon. 222; 4 *id.* 240.

<sup>2</sup> *Moyle v. Mayle*, Owen, 66.

<sup>3</sup> *Douglas v. Wiggins*, 1 Johns. Ch. 435.

<sup>4</sup> *Greene v. Cole*, 2 Saund. 252; s. c. 1 Lev. 309, and 1 Mod. 94; Co. Lit. 53, a; *Jackson v. Cator*, 5 Ves. 689. In *Sweetser v. Eames*, 3 Dane, Abr. 233, it was held not to be waste for the lessee of a corn and grist mill to turn the mill into one for grinding dyewoods, although the lessee took away a part of the apparatus for grinding corn, and substituted others.

<sup>5</sup> 2 Roll. Abr. 815; 22 Vin. Abr. 439; *London v. Greyme*, Cro. Jac. 181; *Wotton v. Wise*, 47 N. Y. S. C. 515. So removal of mantels, *Id.*

<sup>6</sup> *Bonnett v. Saddler*, 14 Ves. 526; *Lathrop v. Marsh*, 5 Ves. 260, and note; *Grey de Wilton v. Saxton*, 6 *id.* 106. Alterations of the house demised are not of course waste, when made without the concurrence of the lessor, unless they are prejudicial to the estate. *Jackson v. Tibbitts*, 3 Wend. 341.

<sup>7</sup> *Agate v. Lowenbein*, 57 N. Y. 604. Here the tenant was authorized to alter as he thought proper, provided no injury was caused. It was held that this only authorized alterations required by his business.

ness of the common law has been essentially modified in this country, and, as now understood, it is not waste for a tenant to erect a new edifice upon the demised premises, or make an alteration therein, if it can be done without destroying or materially injuring the buildings or other improvements already existing thereon. He has no right, indeed, to pull down valuable buildings, or to make improvements or alterations, which will materially and permanently change the nature of the property, so as to make it impossible for him to restore the premises at the expiration of the term, substantially as he received them; but to apply the ancient doctrine of waste to modern tenancies, even for short terms, would, in some of our cities and villages, put an entire stop to the progress of improvement, and deprive the tenant of those benefits which both parties contemplated at the time of the demise, without any possible advantage to the owner of the reversion.<sup>1</sup>

§ 349. **Permissive Waste, what. — Examples.** — Permissive waste to buildings consists in omitting to keep them in tenantable repair; suffering the timbers to become rotten by neglecting to cover the house; or suffering the walls to fall into decay for want of plastering;<sup>2</sup> or the foundation to be injured by neglecting to turn off a stream of water.<sup>3</sup> So if the house or other erection on the premises is destroyed by fire, through the carelessness or negligence of the tenant, it is permissive waste,<sup>4</sup> and he must rebuild in a convenient time at his own expense. The statute before adverted to only guards a tenant from the consequences of a misfortune of this kind, in case the casualty has been purely accidental.<sup>5</sup> Merely suffering the house to remain unroofed (provided it was so at the commencement of the lease) will not be considered waste; but the tenant must take the consequences of any other por-

<sup>1</sup> *Winship v. Pitts*, 3 Paige, 259. As to remedies for waste, see *post*, §§ 686-697.

<sup>2</sup> Co. Lit. 53, a; 2 Roll. Abr. 815, l. 31.

<sup>3</sup> *Sticklehorne v. Hatchman*, Owen, 43.

<sup>4</sup> *Lothrop v. Thayer*, 138 Mass. 466, where the text authorities are collected.

<sup>5</sup> Co. Lit. 53, b; *Rook v. Warth*, 1 Ves. Sr. 462.

tion of it thereby becoming ruinous or decayed.<sup>1</sup> To permit walls built to exclude water to remain in such a dilapidated condition as to cause the lands to be overflowed and injured is waste ; but not, if it be suddenly surrounded by the violence of the sea, as by a tempest, without any fault of the tenant.<sup>2</sup> And though the destruction of a house by lightning, tempest, or a public enemy, is not waste, to suffer it to remain ruined will be so considered.<sup>3</sup> Its destruction by a mob is also waste.<sup>4</sup> A tenant at will is not liable for permissive waste.<sup>5</sup>

§ 350. **Waste by cutting Wood.**—Not only local custom, but the particular circumstances of the case must be taken into account in determining whether the cutting of any given wood is waste or not.<sup>6</sup> To destroy a wood of willows or of hazels is waste ; but cutting willows and hazels in a wood of oak, which are underwood, is no waste.<sup>7</sup> But to cut trees that are not timber, and which are growing in defence of, or to ornament the house, or to injure fruit-trees growing in an orchard or garden, will amount to waste.<sup>8</sup> In determining the question whether trees appertaining to a dwelling-house are ornamental trees or not, it is important to ascertain whether they have been considered and treated as such by the owner of the premises.<sup>9</sup> Cutting willows which grew on the bank of a river, by which the bank fell down, and a

<sup>1</sup> 2 Roll. Abr. 818, l. 1.

<sup>2</sup> Griffith's Case, Moore, 69.

<sup>3</sup> Co. Lit. 53, a.

<sup>4</sup> *White v. Wagner*, 4 Har. & J. 373. But see *Saner v. Bilton*, 7 Ch. D. 815; *Manchester Bond. Warehouse Co. v. Carr*, 5 C. P. D. 507.

<sup>5</sup> *Harnett v. Maitland*, 16 M. & W. 256; *Parrott v. Barney*, Deady, 405; *Coale v. Han. & St. J. R. R.*, 60 Mo. 227; *Lothrop v. Thayer*, 138 Mass. 466. So not for permissive waste by a stranger: *id.*; and therefore he cannot maintain an action against a stranger for such waste.

<sup>6</sup> It is held that custom to remove flints coming to the surface in ploughing, this being necessary to proper cultivation, is reasonable and good, and that the reservation of minerals in the lease does not exclude the custom, and that such removal is not waste. *Tucker v. Linger*, 21 Ch. D. 678, affirmed on appeal, 8 App. Cas. 508.

<sup>7</sup> Bro. Waste, pl. 21.

<sup>8</sup> Co. Lit. 53, a, b.

<sup>9</sup> *Hawley v. Wolverton*, 5 Paige, 522. Trees on a highway, not needed for its construction or repair, belong to the owner of the soil. 1 N. Y. R. S. 525, § 126.

meadow adjoining was overflowed, was held to be waste.<sup>1</sup> But cutting a ditch from the Mohawk River, and diverting it from its channel so as to overflow a swamp covered with timber, by means of which the timber died, was held to be no waste, when it appeared that a new and better growth of timber had sprung up, which in the opinion of the witnesses was worth more than the old timber.<sup>2</sup> The general property *in trees* that are timber is in the owner of the inheritance of the land on which they grow; that in the bushes and underwood is in the tenant.<sup>3</sup> Accordingly, if trees, being timber, are blown down by the wind, or severed by a trespasser, they belong to the lessor, and not to the tenant for life or years, for they are part of the inheritance.<sup>4</sup> But if trees not fit for timber are cut down by the lessor, the property in such trees is vested in the tenant; for the lessor would have no right to them if severed by the act of God, and, therefore, can have no right to them where they have been severed by his own wrongful act; and the same rule holds where they have been severed by a stranger.<sup>5</sup> What constitutes timber depends much upon the custom and opinion of the place where it is situated;<sup>6</sup> but it has been said that trees must be at least twenty years old to constitute timber, and must also be fit for building purposes.<sup>7</sup>

§ 351. **Tenant may cut Wood for necessary Repairs or Estovers.** — A tenant, however, whether for life or for years, may

<sup>1</sup> Sir G. Stripling's Case, 22 Vin. Abr. 449, pl. 11.

<sup>2</sup> Jackson v. Andrew, 18 Johns. 431.

<sup>3</sup> Per Tindal, C. J., in Berriman v. Peacock, 9 Bing. 386. A sale of standing trees by parol is a sale of an interest in land, and void by the Statute of Frauds. Per Edwards, J., in McGregor v. Brown, 10 N. Y. 114.

<sup>4</sup> Ward v. Andrews, 2 Chit. 636; Mooers v. Wait, 3 Wend. 104. Although a tenant for years has a right to reasonable estovers, he has no property in trees felled by another. Bulkley v. Dolbeare, 7 Conn. 235.

<sup>5</sup> Channon v. Patch, 5 B. & C. 897; 2 Chit. 636.

<sup>6</sup> Co. Lit. 53, a; Kidd v. Dennison, *supra*.

<sup>7</sup> Duke of Chandos v. Talbott, 2 P. Wms. 606; Dunn v. Bryan, 7 Ir. R. Eq. 143. Trees, even of the kind that may become timber by attaining a growth of twenty years, may, if under that age, be cut by a lessee, provided they are cut seasonably, or as has been usually done in the neighborhood. *Id.*

lawfully cut timber trees for the necessary repairs of the house and fences, even though he has agreed to repair at his own charge;<sup>1</sup> but then it must be for the repair of such buildings as were on the premises when he entered into possession, and not for such as he may have subsequently erected.<sup>2</sup> And he is entitled to take reasonable *estovers*,—that is, wood from the land,—for fuel, fences, agricultural erections, and other necessary improvements.<sup>3</sup> Nor is it absolutely necessary that such firewood be used on the premises, provided it is taken in good faith for the use of the tenant and his servants, in reasonable quantities, and that the inheritance is not injured.<sup>4</sup> If the house be destroyed, or injured by an accidental fire, the tenant may cut timber to rebuild it; but he cannot cut timber to sell, or to build a new house or new fences where none were before.<sup>5</sup> It must, moreover, be for repairs which are presently needed, and not for such as are only likely to become necessary;<sup>6</sup> nor for such as have been occasioned by his own negligence; for, if the tenant suffer the buildings to fall into decay, and then cut timber to repair them, he will be guilty of double waste.<sup>7</sup> And, if a lessee is authorized by his lease to cut wood for fuel or fencing, he must comply substantially with the conditions of his lease. He cannot omit for years to take firewood and fencing timber from the premises, suffering the wood proper for those uses to be destroyed and wasted, and then, by way of compensation or indemnity, enter upon the premises, and take timber and wood to which the lease gives him no right.<sup>8</sup>

§ 352. **Timber felled must be for actual Repairs. — Firewood. — Clearing Land.**—The timber must also be absolutely and

<sup>1</sup> Moore, 23; Co. Lit. 54, b; Harder v. Harder, 26 Barb. 409.

<sup>2</sup> Co. Lit. 53, a; 41, b.

<sup>3</sup> Hubbard v. Shaw, 12 Allen, 120; Walters v. Hutchins, 29 Ind. 136; Harris v. Goslin, 3 Har. 340.

<sup>4</sup> Gardiner v. Dering, 1 Paige, 573; Co. Lit. 41, b.

<sup>5</sup> Mooers v. Wait, 3 Wend. 104; Davey v. Asquith, Hob. 238.

<sup>6</sup> Georges v. Stanfield, Cro. El. 593.

<sup>7</sup> Padelford v. Padelford, 7 Pick. 152; Co. Lit. 58, b; 2 Roll. Abr. 822, l. 38; Conner v. Shepherd, 15 Mass. 164.

<sup>8</sup> Clarke v. Cummings, 5 Barb. 339.



immediately employed in the repairs for which it was cut; for if the tenant cuts timber and sells it, and out of the proceeds repairs the house,<sup>1</sup> or if he sells it and afterwards buys it again, and then uses it for repairing, he will, in either case, be guilty of waste; for the selling of the trees is waste.<sup>2</sup> It is waste, also, if he cuts timber for the purpose of necessary repairs, but it turns out to be unfit for that purpose, and he then exchanges it for other timber, which was applied to the repairs; for the tenant must, at his peril, select such trees as are fit for the purpose and employ them accordingly.<sup>3</sup> But in Massachusetts, the court held that it was not waste in a tenant for life to cut down timber trees to repair, and sell them to procure boards for the purpose, if that mode of exchange was most beneficial for the estate.<sup>4</sup> And whether trees have been cut for the *bond fide* purpose of repairing is always a question for a jury.<sup>5</sup> Although a tenant may cut firewood for his own use, he may, as we have said, take none to sell, nor any more than is reasonable; nor can he cut any, so long as there is sufficient dead wood on the premises for his consumption.<sup>6</sup> He may, however, cut timber trees that are dead, and such trees as are neither timber nor grow in defence of the house.<sup>7</sup> But he may go no further than cutting; for, if he grubs up trees, hedges, or underwood, he is guilty of waste.<sup>8</sup> But when thorns, bushes, furze, or the like, are growing in pasture or arable lands, the tenant may lawfully stub them up; for this is good husbandry and not waste.<sup>9</sup>

§ 353. **Circumstances determine what is Waste.**—The law of waste accommodates itself to the varying wants and condi-

<sup>1</sup> Vin. Abr. Waste (M.), pl. 1, note. Liberty to a tenant to smelt ore includes the right to cut down timber for that purpose. *Wilson v. Smith*, 5 Yerg. 379.

<sup>2</sup> Co. Lit. 53, b; *Doe v. Wilson*, 11 East, 56; *Mooers v. Wait*, *supra*.

<sup>3</sup> *Simmons v. Norton*, 7 Bing. 640.

<sup>4</sup> *Loomis v. Wilbur*, 5 Mass. 13.

<sup>5</sup> *Doe v. Wilson*, *supra*.

<sup>6</sup> *Simmons v. Norton*, *supra*; *Archdeacon v. Jennor*, Cro. El. 604; 7 Bac. Abr. 252.

<sup>7</sup> *Gage v. Smith*, 2 Roll. Abr. 817, l. 17.

<sup>8</sup> *Lashmer v. Avery*, Cro. Jac. 126.

<sup>9</sup> *Maleverer v. Spinke*, Dyer, 37, a.

tions of different countries; that may not be waste, for example, in an entirely woodland country, which would be waste in a cleared one. A clearing of land in a new country would not be a lasting damage to the inheritance, nor a disherison of him in remainder, which is the true definition of waste. It would, on the contrary, be beneficial to the remainder-man, so long as a sufficiency of timber was left, and the land cleared bears a proper relative proportion to the whole tract.<sup>1</sup> And it has been held that, if the cleared land on the estate was old and worn, and the proportion of woodland such that a prudent farmer would have considered it best to reduce a portion of it to cultivation, and thereby relieve the old land from an excess of culture, and thus enhance the value of the estate,—such clearing would not be waste, provided sufficient timber for the permanent use of the estate was left.<sup>2</sup> As to woodlands, also, Haywood, J., in a North Carolina case, against a tenant for life, defined waste to be “an unnecessary cutting down and disposing of timber, or destruction thereof, upon woodlands where there is already sufficient cleared land for the tenant’s cultivation, and over and above what is necessary to be used for fuel, fences, plantation, utensils, and the like.”<sup>3</sup>

<sup>1</sup> *Findlay v. Smith*, 6 Munf. 134; *Crouch v. Puryear*, 1 Rand. 258; *Den v. Kinney*, 2 South. 552; *McCracken’s Heirs v. McCracken’s Ex’rs*, 6 T. B. Monr. 342; *Hastings v. Crunckleton*, 3 Yeates, 261. When a farm consisting mainly of woodland is leased for agricultural purposes, the lessee is justifiable in felling the timber, to fit the land for cultivation, leaving a sufficient quantity for all the purposes of the farm, and the property of the timber cut is in the lessee. But if he cut trees for sale, and not for the purpose of preparing the land for cultivation, it is waste. *Kidd v. Dennison*, 6 Barb. 9; *People v. Davison*, 4 *id.* 109.

<sup>2</sup> *Owen v. Hyde*, 6 Yerg. 334; *Loomis v. Wilbur*, 5 Mason, 13; *Parkins v. Coxe*, 2 Hayw. 339. In this country, no act of a tenant amounts to waste, unless it is prejudicial to the inheritance. *Pyncheon v. Stearns*, 11 Met. 304.

<sup>3</sup> *Ballentine v. Poyner*, 2 Hayw. 110; *Wilson v. Smith*, 5 Yerg. 379. In New York, where fifteen months is allowed for the redemption of land sold under an execution, before the creditor is entitled to take possession, the statute declares that certain acts of the occupant shall not amount to waste. Any person entitled to the possession of lands or tenements sold under execution may, until the expiration of fifteen months from the time of such sale, use and enjoy the same as follows, without being guilty of waste: 1. He may, in all cases, use and enjoy the premises sold, in

But where wild and uncultivated land, wholly covered with wood and timber, is leased, the lessee may fell part of the wood and timber, so as to fit the land for cultivation. He may not, however, cut so much even of this as to injure the inheritance; but to what extent he may go without committing waste is always a question for a jury to determine in each particular case.<sup>1</sup> If he cuts trees merely for the sake of profit to be derived from a sale of the timber, and not for the purpose of preparing the land for cultivation, he is clearly guilty of waste. And although he may, from the commencement of his term, gradually clear up the woodland, and prepare it for cultivation, yet he will not be permitted, just before the expiration of his lease, to cut down timber upon that pretext.<sup>2</sup> Where land is annexed to a furnace, the cutting of wood sufficient for the supply of the furnace was held in New Jersey to be no waste;<sup>3</sup> while in North Carolina, it was held waste to cut down light-wood for tar.<sup>4</sup>

like manner and for the like purposes in and for which they were used and applied prior to such sale, doing no permanent injury to the freehold. 2. If the premises sold were buildings, or any other erections, he may make necessary repairs thereto, but he shall make no alterations in the form or structure thereof. 3. If the premises sold were land, he may use and improve the same in the usual course of husbandry, but he shall not be entitled to any crops growing thereon at the expiration of the said fifteen months. 4. He may apply any wood or timber on such land to the necessary reparation of any fences, buildings, or erections, which may have been thereon at the time of the sale. 5. If the land sold is actually occupied by such person, he may take necessary firewood therefrom for the use of his family. 2 R. S. 336, § 21.

<sup>1</sup> *Jackson v. Brownson*, 7 Johns. 227; *Adams v. Brereton*, 3 Har. & J. 124. The New York Court of Appeals hold that the cutting of trees by a tenant for years, except under special circumstances, is waste; and that in an action by a landlord for such waste, evidence of a parol consent by the landlord to the cutting of the trees, on condition that the tenant would clear and seed down the land where the trees were cut, is not admissible, — such consent being a mere license, and requiring a writing to give it validity. And the opinions of witnesses that such acts were not injurious to the inheritance, and therefore not waste, are inadmissible. *McGregor v. Brown*, 10 N. Y. 114.

<sup>2</sup> *Kidd v. Dennison*, 6 Barb. 9; *Livingston v. Reynolds*, 26 Wend. 122; s. c. 2 Hill, 157.

<sup>3</sup> *Den v. Kinney*, 2 South. 552.

<sup>4</sup> *Parkins v. Coxe*, 2 Hayw. 339. The American doctrine, on the

§ 354. **Landlord entitled to things Unlawfully Severed from the Soil.** — When the tenant commits waste by felling timber or houses, they still remain the property of the person who is entitled to the inheritance: for the tenant had them as things annexed to the soil, and it would be absurd that, when by his own wrongful act he severs them from the land, he should gain a greater property in them than he had before.<sup>1</sup> And whether they were felled by the tenant or by some other person, or blown down by a tempest, the lessor is still entitled to them, in respect to his general ownership, and because they were a portion of his inheritance.<sup>2</sup> So also sea-weed thrown by the sea upon the beach vests in the owner of the soil as much as the wood, grass, or any other thing appurtenant to the ownership of the soil; though, as between landlord and tenant, the latter, doubtless, would be allowed to make use of it, unless it had been expressly reserved by the lease.<sup>3</sup>

§ 355. **Leases without Impeachment of Waste.** — Sometimes a clause is inserted in the lease, that a tenant shall have the land without impeachment of waste; this expression is equivalent to an authority to commit waste, and, at common law, authorized him to cut timber, or open new mines, and convert the produce to his own use.<sup>4</sup> But if the words were, “without impeachment of any action of waste,” they only gave the

subject of waste by cutting timber, undoubtedly differs from the English, in consequence of the differing circumstances of the two countries. In England, timber is an object of extraordinary care, while in the United States, particularly in former years, it was desirable to get rid of it. It was therefore said that it would be an outrage on common-sense to suppose that what would be deemed waste in England would receive that appellation here; and that if a tenant in dower clears part of the land assigned to her, and does not exceed the relative proportion of cleared land, considered in reference to the whole tract, she cannot be said to have committed waste thereby. *Hastings v. Crunckleton*, 3 Yeates, 261.

<sup>1</sup> *Mooers v. Wait*, 3 Wend. 104; *Kidd v. Dennison*, *supra*.

<sup>2</sup> *Bulkley v. Dolbeare*, 7 Conn. 232; *Liford's Case*, 11 Co. 48, a; *Bewick v. Whitfield*, 3 P. Wms. 266, 1 Coxe, 72; *Shult v. Barker*, 12 S. & R. 272; *Elliott v. Smith*, 2 N. H. 430.

<sup>3</sup> *Emans v. Turnbull*, 2 Johns. 322.

<sup>4</sup> *Pyne v. Dor*, 1 T. R. 55; *Williams v. Williams*, 15 Ves. 425; *Co. Lit.* 220, a; *Bowles's Case*, 11 Co. 81, b.

tenant a discharge from the action, but not the property in the thing granted.<sup>1</sup> Equity, however, now gives a more limited construction to the first clause, and allows the tenant for life those powers only which a prudent tenant in fee ought to exercise. He cannot, therefore, pull down or dilapidate houses, destroy pleasure-grounds, or prostrate trees planted for shelter.<sup>2</sup> And where a lease contained a clause authorizing the lessee to make such alterations inside of the building as he should think proper, provided they did not injure the premises, it was held that while the clause authorized alterations which in point of law, and technically, would be waste, yet they must be such acts only as were unaccompanied with actual injury to the premises and not done wantonly or capriciously, but made with a purpose of facilitating the transaction of the lessee's business.<sup>3</sup> But a tenant for life, without impeachment of waste, is liable, on his express covenant, to repair, notwithstanding such a covenant is inconsistent with his estate; for where a man expressly covenants to do an act, which he would not otherwise be bound by law to perform, public policy requires that his contract shall be strictly observed; and he cannot, in general, be relieved from the responsibility he has imposed on himself by his own deliberate act.<sup>4</sup>

§ 356. **Proper Cultivation required under the Covenant.**—Not only is waste prohibited by law, but the covenant calls upon the tenant, in addition thereto, to cultivate the lands in a husbandly manner, and in conformity to the *usual and reasonable custom of the country*.<sup>5</sup> This, however, extends only to the usual course of cultivation, and not to any extraordinary mode of agriculture.<sup>6</sup> In this, as in other cases, the parties

<sup>1</sup> *Id.*; *Vane v. Lord Barnard*, 1 Salk. 161; 22 Vin. Abr. 505.

<sup>2</sup> *Vane v. Lord Barnard*, 2 Vern. 738; 2 Eq. Cas. Abr. tit. Waste, pl. 8; *Packington's Case*, 3 Atk. 215.

<sup>3</sup> *Agate v. Lowenbein*, 57 N. Y. 604. In this case the authorities on the subject of waste are extensively collated and discussed.

<sup>4</sup> *Chesterfield v. Bolton*, Com. 627; *Barker v. Thorold*, 1 Saund. 47.

<sup>5</sup> *Powley v. Walker*, 5 T. R. 373. The remedies for waste, both preventive and compensatory, are discussed in another part of our work, — commencing at § 686.

<sup>6</sup> *Brown v. Crump*, 6 Taunt. 800.

may, of course, stipulate in what manner, and to what extent, the land shall be cultivated; but unless such a stipulation is made, the parties are to be governed by the usual practice and custom of the neighborhood.<sup>1</sup> A tenant who has agreed to deliver up all the trees standing in an orchard at the time of the lease, reasonable use and wear only excepted, is not prevented from removing trees which are decayed and past bearing, from a part of the orchard which was overstocked.<sup>2</sup>

§ 357. **Express Covenant, Effect of.** — When a tenant is under an express covenant to repair the premises, he is liable to make good all loss and damage which they may sustain, and must even rebuild in case of casualty by fire or otherwise.<sup>3</sup> Being annexed to the demised property, and forming part of it, this covenant runs with the land, and binds an assignee, although not named.<sup>4</sup> It is also divisible, charging an assignee of part only of the premises;<sup>5</sup> and the general covenant extends as well to buildings erected by the tenant as to those originally demised.<sup>6</sup> And if the terms are clearly defined, and the agreement is so distinct that the court can describe the building, a specific performance of this contract will be decreed.<sup>7</sup> If a lessee who has erected fixtures for the purpose of trade upon the demised premises afterwards takes a new lease, to commence at the expiration of his former one,

<sup>1</sup> *Doe v. Crouch*, 2 Camp. 449.

<sup>2</sup> *Lagh v. Hewett*, 4 East, 154; *Wigglesworth v. Dallison*, Doug. 201; *Webb v. Plummer*, 2 B. & A. 746.

<sup>3</sup> *Cline v. Black*, 4 McCord, 431; *Ross v. Overton*, 3 Call, 309; *Pym v. Blackburn*, 3 Ves. 38; *Digby v. Atkinson*, 4 Camp. 275; *Phillips v. Stevens*, 16 Mass. 238; *Beach v. Crain*, 2 N. Y. 86; *Moyer v. Mitchell*, 53 Md. 171; *Hoy v. Holt*, 91 Pa. St. 88. He must even repair a sinking of the foundation wall arising from original defective construction. *Lockrow v. Horgan*, 58 N. Y. 635. In *Halbut v. Forrest City*, 34 Ark. 246, it was held that the meaning of the parties should control the lessee's contract to redeliver the premises in any prescribed condition of good order or repair.

<sup>4</sup> *Spencer's Case*, 5 Co. 16; *Dean & Chapt. of Windsor's Case*, 5 Co. 24, a; *Keeling v. Morrice*, 12 Mod. 371.

<sup>5</sup> *Congham v. King*, Cro. Car. 221.

<sup>6</sup> *Dowse v. Cale*, 2 Vent. 126; *Brown v. Blunden*, Skin. 121.

<sup>7</sup> *Mosely v. Virgin*, 3 Ves. 184.

which new lease contains a covenant to repair, he will be bound to repair those fixtures, unless strong circumstances exist to show that they were not intended to pass under the general words of the second demise; though it is doubtful whether any circumstances outside of the deed can be alleged to show that they were not intended to pass.<sup>1</sup>

§ 358. **Forms of Covenant construed.**—Under a general covenant to repair,<sup>2</sup> the tenant must take care that the tenement does not suffer more than the usual operations of time and nature will effect; but he is not bound to go further. He is only to keep up an old house as an old house; he is not obliged to put in new floors, or the like, but merely to repair the old ones, although a new floor might be the more substantial way of making the repair.<sup>3</sup> But under a covenant to substantially repair, uphold, and maintain the house, the tenant is bound to keep up the inside painting.<sup>4</sup> Breaking glass has been held to be a breach of this covenant; so has the leaving of a pavement out of repair; for such things are said to be within the

<sup>1</sup> *Thresher v. Lond. W. Works*, 2 B. & C. 608.

<sup>2</sup> A covenant to keep the premises "in as good repair as they now are" is held equivalent to the general covenant to repair. *Stultz v. Locke*, 47 Md. 562.

<sup>3</sup> Per Tindal, C. J., in *Harris v. Jones*, 1 Mood. & R. 173; *Stanley v. Towgood*, 3 Bing. (N. C.) 4; *Gutteridge v. Munyard*, 7 C. & P. 129; *Harris v. Coulbourn*, 3 Harr. 338; *White v. Albany Railway*, 17 Hun, 98. These cases establish that where there is a general covenant to repair, the age and condition of the house at the commencement of the tenancy are to be taken into consideration in considering whether the covenant has been broken; and that a tenant who enters into an old house is not bound to leave it in the same state as if it were a new one. He must put the property in as good condition as can be done without change of form or material. *Ardesco Oil Co. v. Richardson*, 63 Pa. St. 162. See also *Mantz v. Goring*, 4 Bing. (N. C.) 451. But where the tenant covenants to keep the premises, and to deliver them up, at the expiration of the tenancy, in good repair, order, and condition, he is bound to put them into good repair, and is not justified in keeping them in bad repair, because he found them in that condition. Even in this case, however, the extent of the repairs is to be measured by the age and class of the buildings. *Payne v. Haine*, 16 M. & W. 541. So *Easton v. Pratt*, 2 Hurlst. & C. 676. But see *Doe v. Rowland*, 9 C. & P. 734.

<sup>4</sup> *Mark v. Noyes*, 1 C. & P. 265.



intention of the covenant, and belong to the building.<sup>1</sup> Upon the like principle, it has been determined that carrying away the locks and keys of a cupboard, or its shelves, will constitute a breach; or breaking the wall of a house, for the purpose of making a doorway into an adjoining house.<sup>2</sup> So, where a plaintiff granted to the defendant a right of way over his land, and covenanted to erect a gate at the terminus, the defendant, on his part, covenanting to make all the necessary repairs to said gate, — it was held that the defendant was bound to replace the gate when it had been removed by some unknown person.<sup>3</sup> A covenant to keep a mill *in necessary repair*, although it imposes no obligation upon a tenant to add improvements, yet requires him to renew existing machinery when it gets too old or worn to answer its purpose in the mill.<sup>4</sup>

§ 359. Breach of, arises from Want of substantial Repair.— With respect to breaches of this covenant, the usual question is whether the premises have been kept in substantial repair, as opposed to claims for fancied injuries, such as a crack in a pane of glass, or the like.<sup>5</sup> And with a view to the determination of this question, the jury may inquire whether the premises were new or old at the time of the demise, and must be regulated in their verdict accordingly.<sup>6</sup> If, however, a lessee covenants to support and maintain the brick walls belonging to the demised premises, and he pulls down a brick wall which divides a front court-yard from another court at the side of the

<sup>1</sup> Pyot v. Lady St. John, Cro. Jac. 329; s. c. 2 Bulst. 102.

<sup>2</sup> Doe v. Jackson, 2 Stark. 293. It is a breach of a covenant to leave in repair for the tenant to remove from a barn a box-stall for horses which he had put in, as this injures the freehold. Morgan v. Morss, 27 Mich. 208.

<sup>3</sup> Beach v. Crain, 2 N. Y. 86.

<sup>4</sup> Coke v. England, 27 Md. 14.

<sup>5</sup> And it is no breach of the covenant to leave in repair, that the tenant left a large quantity of rubbish in the cellar of the premises. Thorndike v. Burrage, 111 Mass. 531.

<sup>6</sup> Stanley v. Towgood, *supra*; Burdett v. Withers, 7 Ad. & E. 186. A covenant by an under-lessee to repair after notice is not broken by a non-compliance with a notice to repair served upon the premises by the superior landlord as such landlord. Williams v. Williams, L. R. 9 C. P. 659.

house, it will amount to a breach.<sup>1</sup> But an enlargement of windows, opening external doors, and taking down partitions, is not a breach of the covenant to repair and keep in repair a dwelling-house, with all buildings, improvements, and additions, set up or made by the lessee.<sup>2</sup> Nor is a tenant bound, under this covenant, to be at the expense of renewing the work in an improved or more durable manner than before.<sup>3</sup>

§ 360. **Liability under, as affected by Act of God. — Exception of "Fair Wear and Tear."** — A lessee will not in general be excused by *an act of God* from the performance of any express covenant he has entered into, and which it is in his power to perform; yet if he covenants to keep the premises in the *same state* in which they were when he took them, and trees are blown down, this covenant is not thereby broken; for it has by the act of God become impossible for him to keep this part of the covenant.<sup>4</sup> But the case is different if he cuts the trees himself, for he then breaks the covenant by his own act. And there is a difference, also, with respect to buildings; for whether these be destroyed by the act of God, by negligence, or by design, the covenant still remains binding, and the tenant will be guilty of a breach of it by failing to restore them, for this is clearly within his power.<sup>5</sup> If he undertakes to keep the house in as good repair as when he

<sup>1</sup> Doe v. Bird, 6 C. & P. 195.

<sup>2</sup> Doe v. Jones, 4 B. & Ad. 126.

<sup>3</sup> Soward v. Leggatt, 7 C. & P. 613. The term *habitable repair* means a state of repair reasonably fit for the occupation of an inhabitant. Where a tenant leases premises out of repair, and agrees to put them into *habitable repair*, this implies that he is to put them into a better state than that in which he found them. Belcher v. McIntosh, 8 C. & P. 720. And a tenant is still bound to repair, although the agreement as to the duration of the term may be void under the Statute of Frauds. Richardson v. Gifford, 1 Ad. & E. 52.

<sup>4</sup> Main's Case, 5 Co. 20, b; Shep. Touch. 173. Where a tenant undertakes to keep the premises in good and sufficient repair, he is entitled to show at the trial what the state of the premises was at the time of the demise; and the jury are to take all the circumstances into consideration in assessing damages. Burdett v. Withers, 7 Ad. & E. 136.

<sup>5</sup> Brecknock Canal Co. v. Pritchard, 6 T. R. 750; Compton v. Allen, Style, 162; Polack v. Pioche, 35 Cal. 416. And the injury caused by the breaking of a reservoir — overfilled by unusual rains — through the negligence of a stranger, is not within the exception of an act of God. *Id.*

took it, *fair wear and tear excepted*, he is not entitled to quit upon its becoming uninhabitable for want of other repairs during the term ; nor is he under any obligation to repair in case it should fall down in consequence of its own defective construction.<sup>1</sup> Neither will the fact that the act of waste was committed by a stranger form any excuse for the tenant ; for the law in such case gives him a remedy over, but makes him responsible in the first instance.<sup>2</sup> As, where a lessee for years covenanted that the buildings which he should erect should, at the expiration of the term, revert to the lessor “without damage of any kind, except the natural wear of the same,” and a building so erected was destroyed by the negligent acts of a third party, — it was held to be waste, for which the tenant was responsible to the lessor, and that the lessee or his assignee might recover, in an action against the party guilty of the negligence, the value of the building.<sup>3</sup> But under a covenant to deliver up possession of the premises at the end of the term in as good order and condition as at the date of the lease, ordinary wear and tear excepted, he is not bound to rebuild in case of fire, there being no covenant to repair or rebuild.<sup>4</sup> So where it was agreed that certain specified articles

<sup>1</sup> Arden v. Pullen, 10 M. & W. 321; Hess v. Newcomer, 7 Md. 325; and see Smith v. Stagg, 47 N. Y. S. C. 514. So where the lessee covenanted that he and his assigns should not build, and a railway company compelled him to convey to them, by exercise of eminent domain, and then built, he was held not liable. Baily v. De Crespigny, 10 B. & S. 1. But where the erection took place after the company had notified him that they should take, but before they did take, the lessee was held liable. Mills v. E. Lond. Union, L. R. 8 C. P. 79. If a lease contains a covenant by a lessor to put in repair, and a covenant by the lessee to keep in repair, the performance of the former is a condition precedent to requiring performance by the latter. Coward v. Gregory, L. R. 2 C. P. 153. And where the tenant covenanted to leave the house in the same repair as it was put by the lessor, held, that this included repairs done by the tenant before the term at the landlord's instance. Holbrook v. Chamberlain, 116 Mass. 155. The words *wear and tear* do not necessarily imply a gradual deterioration, but may apply to a sudden accident caused by a defect. Hess v. Newcomer, *supra*.

<sup>2</sup> Polack v. Pioche, *supra*.

<sup>3</sup> Cook v. Champl. Tr. Co., 1 Den. 91; 4 Kent, Com. 77.

<sup>4</sup> Warner v. Hitchins, 5 Barb. 666; Miller v. Morris, 55 Tex. 412; Warren v. Wagner, 75 Ala. 188; but see *post*, § 364, note.

should constitute a portion of the demise, and should remain on the premises at the end of the term, or be replaced or paid for by the lessee, and the covenant to surrender the demised premises at the end of the term contained an exception of damage by the elements; the chattels having been destroyed by accidental fire during the term, it was held that the tenant was not bound to replace or pay for them, the last-mentioned covenant modifying the strict terms of the other.<sup>1</sup>

§ 361. **Special Covenants construed.** — When a man covenants to keep buildings in repair during the term, and he pulls them down, or suffers them to decay, or omits to make necessary repairs, he is immediately guilty of a breach of this covenant, and an action may be maintained against him by the landlord before the term has expired.<sup>2</sup> If the covenant had been merely to leave the premises in good repair, it would have been otherwise, for there could have been no breach during his occupation.<sup>3</sup> And if he covenants to repair

<sup>1</sup> *Allen v. Culver*, 3 Den. 284. In a lease of a glass manufactory, and of the tools and moulds connected therewith, the lessee covenanted to return the said tools and moulds to the lessor at the end of the term in as good order as they were in at the time of the demise, reasonable wear and tear, and damages by fire excepted, and the lessor agreed that the lessee should have the privilege of expending a hundred dollars a year in repairs on the property, deducting the same from the rent. Held, that the terms of the lease neither limited the duties of the tenant in the matter of repairs, nor excused permissive waste arising from his suffering the premises to decay from want of necessary repairs. *Townsend v. Moore*, 33 N. J. 284.

<sup>2</sup> *Luxmore v. Robson*, 1 B. & A. 584; *Shep. Touch.* 173. So *Doe v. Rowlands*, 9 C. & P. 734; *Gange v. Lockwood*, 2 Fost. & F. 115; *Block v. Ebner*, 54 Ind. 544; *Webster v. Nosser*, 2 Daly, 186. So where lessee covenanted to "maintain in repair:" *Buck v. Pike*, 27 Vt. 529; and the measure of damages is not the cost of repairing, but the injury done to the reversion: *id.*; *Smith v. Peat*, 9 Exch. 161; *Turner v. Lamb*, 14 M. & W. 412. But where the covenant is also to deliver up at the end of the term, or to keep in repair and leave as found, no action is maintainable before the end of the term. *Atkins v. Chilson*, 9 Met. 52, 63; 40 Edw. III. 5; cited 5 Barb. 676.

<sup>3</sup> *Schieffelin v. Carpenter*, 15 Wend. 409; *Hopkins v. Bradford*, 1 Pitts. 165. And where the covenant to repair is general, and no time is fixed when the repairs are to be done, the tenant has the whole term to do them

and leave them in as good state as he found them, and then pulls them down, he is not guilty of a breach of the covenant, for he may rebuild them before he leaves, and therefore no action will lie against him until the end of the term.<sup>1</sup> A covenant to repair *forthwith*, must receive a reasonable construction, and is not limited to any specific time.<sup>2</sup> If, therefore, a man covenants to keep a house in repair, and it becomes ruinous by accident, the covenant will not become broken till after a convenient time for its repair has elapsed. And if he engages to repair it before a particular day, and it becomes impossible by the act of God to make the repairs by that day, he will not be liable for a breach of the covenant, if he repairs it as soon as possible thereafter; but the repairs must be made during the term, for if the tenant enters for that purpose after the expiration of the term, he will be a trespasser.<sup>3</sup> Where there was a lease for a year of a meadow

in. *Colhoun v. Wilson*, 27 Gratt. 639. So in a lease containing a general covenant to repair, and a covenant to repair on three months' notice, no action was held to lie on the former until the term ended, except for injuries to the reversion. *Williams v. Williams*, L. R. 9 C. P. 659. But where the tenant, being licensed to alter, made alterations beyond what he was justified in doing, it was held that an action immediately lay. *Agate v. Lowenbein*, 57 N. Y. 604. On a covenant to deliver up the leased premises in good condition at the end of the term, the lessee is not liable for an injury to a portable wood-cutting machine found on the premises, though worked by a belt attached to the factory; for it is a chattel and does not pass by a lease which demises the factory and land. *Holbrook v. Chamberlain*, 116 Mass. 161.

<sup>1</sup> The mere removal and sale by a tenant, during the term, of fixtures, which he does not immediately replace, but which can be replaced before the end of the term, is not in itself a breach of the covenant to repair, and uphold the premises, and deliver them up at the end of the term with all things affixed thereto. *Doe v. Davis*, 1 Ellis & E. 403.

<sup>2</sup> *Doe v. Sutton*, 9 C. & P. 706. And it belongs to a jury to say, upon the evidence, whether the defendant has done what he reasonably ought to have done in the performance of his covenant. *Id.* If he agrees to keep the premises in repair during the tenancy, and before the expiration of the term an action is brought against him for a breach of his agreement, the plaintiff is entitled to recover nominal damages only. *Marriott v. Cotton*, 2 C. & K. 553.

<sup>3</sup> *Shep. Touch.* 173; *Compton v. Allen*, *Style*, 162; *Main's Case*, 5 Co. 21.

bounded on one side by a river, and the lessee covenanted to sustain and repair the banks, to prevent the water from overflowing the meadow, upon pain of forfeiting a certain sum of money, and afterwards, by a sudden and violent flood, the banks were destroyed, the lessee was excused from the penalty, because it was the act of God which could not be resisted; but he was held bound to repair the banks in a convenient time, because of his covenant.<sup>1</sup>

§ 362. **General Covenant with additional Stipulations.**—Where a lease contains a general covenant to keep the premises in repair, with a clause of re-entry for a breach of covenant, and a further covenant that the tenant shall, within a certain time after notice served upon him by the landlord, repair all defects specified in the notice, the first covenant will not, in general, be held to be restrained by the latter.<sup>2</sup> And it has been held that a covenant by the lessee to leave the premises in repair, and a covenant that the lessor might direct the lessee to complete the repairs, by giving six months' notice in writing, were distinct and separate covenants, and that the former was not qualified by the latter.<sup>3</sup> But where a lessee covenanted to repair the premises at all times, as often as need should require, and, at furthest, within three months after notice, it was held to be one entire covenant, the

<sup>1</sup> Dyer, 33, a; *Walton v. Waterhouse*, 2 Saund. 420, n. (2). Covenant to take down houses within a certain term and erect new ones, may be complied with by completely and substantially repairing without taking down. *Evelyn v. Raddish*, 7 Taunt. 411.

<sup>2</sup> *Roe v. Paine*, 2 Camp. 520; *Doe v. Meux*, 4 B. & C. 606; *Doe v. Lewis*, 5 Ad. & E. 277. So it was held in *Kling v. Dress*, 5 Rob. (N. Y.) 521, that a covenant to repair, with a clause of re-entry for breach, is not qualified by a covenant to deliver up in the same repair as when taken, damages by elements excepted. But in *Ball v. Wyeth*, 8 Allen, 275, a covenant to repair was held qualified by a covenant to quit and deliver up, &c., wear and tear and casualties excepted.

<sup>3</sup> *Wood v. Day*, 7 Taunt. 646. In *Williams v. Williams*, *supra*, a general covenant to repair was treated as consistent with and not qualified by a covenant to repair on three months' notice. A parol agreement by a tenant under a sealed lease, having some years yet to run, to leave buildings on the premises at the end of the term, is void. *Lawrence v. Woods*, 4 Bosw. 354.

former part of which was qualified by the latter.<sup>1</sup> A tenant holding over after the expiration of his term, impliedly holds subject to all the covenants in the lease which are applicable to his new situation ; and therefore, if after the expiration of a written lease containing a covenant by the lessee to keep the premises in repair, he verbally agrees to continue tenant, paying an additional rent, nothing more being expressed between the parties respecting the terms of the new tenancy, and the premises afterwards become ruinous by accidental fire, he is bound to repair them. And a mere advance in the amount of rent to be paid, makes no difference, for the advanced rent incorporates the old terms with the new contract, the parties still being supposed in other respects to have had reference to the old lease ; and there is an implied *assumpsit* raised by the continual holding, though an action would not lie on the covenant.<sup>2</sup>

§ 363. **Covenant valid though contained in void Lease.**— The same principle applies to a void lease, for the tenant is still bound by a covenant to repair, although the agreement under which he holds may be void, or contrary to the Statute of Frauds. Thus, where a lease was granted by a tenant for life under a power containing a covenant to repair, but not made in accordance with the power, and the lease was assigned to the defendant, who, after the death of the tenant for life, when the lease would terminate, continued to pay rent to the remainder-man, for a short period ; the premises being left out of repair, the landlord brought an action for damages against such assignee, on an implied *assumpsit* to repair ; and it was held he was entitled to recover up to the end of the term mentioned in the lease, on the ground that the tenant was liable to all the stipulations contained in the lease in the same way as a tenant is who holds over after the determination of the lease. But if a breach of the covenant to repair takes place during the continuance of the lease, persons claiming under the lessee, and coming into possession after the determination

<sup>1</sup> *Horsfall v. Testar*, 7 Taunt. 385.

<sup>2</sup> *Digby v. Atkinson*, 4 Camp. 275; *Kimpton v. Eve*, 2 Ves. & B. 353; *Brudnell v. Roberts*, 2 Wils. 143.



of the lease, will not be liable on an implied promise, to restore the premises to the same state in which they were at the commencement of the original lease.<sup>1</sup>

§ 364. **Under express Covenant, Tenant liable for accidental Injury or Destruction.** — Under an express covenant to repair, the lessee's liability is not confined to cases of ordinary and gradual decay, but extends to injuries done to the property by fire, although accidental; and even if the premises are entirely consumed, he is still bound to repair within a reasonable time.<sup>2</sup> And the principle applies to all damages occasioned by a public enemy, or by a mob, flood, or tempest.<sup>3</sup> Thus where the covenant is *to repair* in general terms, or *to repair, uphold, and support*, or however otherwise phrased, if it undertakes the duty of repair, it binds the lessee to rebuild if the premises are destroyed.<sup>4</sup> For this reason, and in order to afford some pro-

<sup>1</sup> *Beal v. Saunders*, 3 Bing. (N. C.) 850; *Johnson v. St. Peter's Hereford*, 4 Ad. & E. 520. Breaking a doorway through the wall of the demised premises into the adjoining house, and keeping it open for a long time, is a breach of a covenant to keep in repair. *Doe v. Jackson*, 2 Stark. 260. But in a long lease this covenant is not broken by the tenant's making alterations. *Doe v. Jones*, 4 B. & Ad. 126.

<sup>2</sup> *Bullock v. Dommitt*, 6 T. R. 650; *Phillips v. Stevens*, 16 Mass. 238; *Pym v. Blackburn*, 3 Ves. 38; *Walton v. Waterhouse*, 2 Saund. 420, n. (2); *Chesterfield v. Bolton*, Com. 627; *Wainscott v. Silvers*, 13 Ind. 497.

<sup>3</sup> *Paradine v. Jane*, Alleyn, 26; *Bullock v. Dommitt*, *supra*; *Phillips v. Stevens*, *supra*; *Bohannons v. Lewis*, 3 T. B. Monr. 370.

<sup>4</sup> *Beach v. Crain*, 2 N. Y. 86. Thus where it was to "keep in repair, and leave as found:" *Phillips v. Stevens*, 16 Mass. 238; *Pym v. Blackburn*, 3 Ves. 34, 38; *Bigelow v. Collamore*, 5 Cush. 231; *Ely v. Ely*, 80 Ill. 532; to "deliver in tenantable repair:" *Ross v. Overton*, 8 Call. 309; to "make all necessary repairs:" *Myers v. Burns*, 33 Barb. 401; *Beach v. Crain*, *supra*; *Leavitt v. Fletcher*, 10 Allen, 119; to "repair and keep in repair:" *Green v. Eales*, 2 Q. B. 225; to "keep in good repair:" *Tilden v. Tilden*, 13 Gray, 103, 109; *Cline v. Black*, 4 McCord, 431; *Cowell v. Lumley*, 39 Cal. 151; "except wear and tear:" *McIntosh v. Lown*, 49 Barb. 550; or "well and sufficiently to repair, support, uphold, &c., &c.:" *Digby v. Atkinson*, 4 Camp. 275; *Walton v. Waterhouse*, 2 Saund. 420. In *Warner v. Hitchins*, 5 Barb. 666, it was held that a covenant to "surrender up in same condition as at date of the lease," did not bind the lessee to rebuild, as the covenant looked not to repair, but redelivery. So *Horwitz v. Anderson*, 25 Tex. 557. In *McIntosh v. Lown*, 49 Barb. 550,

tection to the tenant, it is customary to introduce into the covenant to repair, an exception against accidents by fire, tempest, or lightning.<sup>1</sup>

§ 365. **May be apportioned among Assignees of the Reversion.** — We have seen that this is a covenant running with the land, binding upon the assignee of the reversion; it may therefore be apportioned among the assignees of different parts of the reversion.<sup>2</sup> An equitable assignee is also liable in equity to the lessee to repair all damages which have occurred during his occupation;<sup>3</sup> and an assignee by way of mortgage is equally liable, though he never takes possession.<sup>4</sup> Until recently, a mere depositary of a lease by way of mortgage, whether he had entered into possession of the premises or not, was compelled to take an actual assignment, and so clothe himself with the legal estate and its consequent liabilities;<sup>5</sup> but the important consequences of this doctrine, particularly to the mercantile community, who are in the habit of taking deposits of leases as security for temporary loans, caused the question to be reviewed, when it was determined that, although the lessor may consider the depositary of the lease its equitable assignee, yet that he has no equity to compel him to take an assignment of the lease, or to oblige the depositor to assign it.<sup>6</sup> Nor will the court compel an equitable assignee, at the

555, it was stated as settled law that a covenant to "repair and leave in same repair as at date of lease," did not bind lessee to rebuild. But this goes beyond the preceding case, where such words, it was admitted, would so bind the lessee. And there can be no doubt that they make a covenant to repair. *Ross v. Overton*, *Ely v. Ely*, *supra*; *Kramer v. Cook*, 7 Gray, 550, 553; *Jacques v. Gould*, 4 Cush. 384, 388.

<sup>1</sup> "Damages by the elements," excepted from the lessee's covenant to keep in repair, cover destruction by fire occurring without the lessee's fault; for in the popular acceptation of the phrase, injuries by the elements are such as result from the operation of the most common destructive forces of nature, and of these fire is the chief. Per Cooley, J., in *Van Wormer v. Crane*, 51 Mich. 363.

<sup>2</sup> *Ante*, §§ 260, 262, 357; *Badeley v. Vigurs*, 4 Ellis & B. 71.

<sup>3</sup> *Close v. Wilberforce*, 1 Beav. 112; *Willson v. Leonard*, 3 *id.* 373.

<sup>4</sup> *Pilkington v. Shaller*, 2 Vern. 374.

<sup>5</sup> *Lucas v. Commerford*, 1 Ves. 235; s. c. 3 Bro. C. C. 166, cited in *Flight v. Bentley*, 7 Sim. 153.

<sup>6</sup> *Moore v. Choat*, 8 Sim. 508; *Jenkins v. Portman*, 1 Keen, 435.

suit of the lessor, to discover whether the lease has been assigned to him, for the purpose of forcing him to perform the covenants embraced therein.<sup>1</sup>

§ 366. **Covenant to Insure.** — Where there is, besides a covenant to repair, a covenant to insure for a certain sum, and the premises are burned, the lessee's liability to rebuild is not limited to the amount for which he agreed to insure.<sup>2</sup> Nor has the tenant any equity to compel his landlord to expend money received from an insurance company in rebuilding the demised premises, on their being burnt down, or to restrain the landlord from suing for the rent, until after the premises shall have been rebuilt.<sup>3</sup> An eviction by elder title will absolve the lessee from a covenant to repair, for the land being gone, the covenant is annulled.<sup>4</sup> But an eviction out of part of the thing demised is no defence to an action for a breach of this covenant, unless it be shown that the lessee has been evicted from that part of the land where the repairs were to be done, and so prevented from fulfilling his covenant.<sup>5</sup> The general covenant of the lessee to repair extends to all buildings erected during the term, as well as to the buildings demised; if, therefore, upon a demise of three houses with such a covenant, the lessee builds a fourth, he will be bound to repair this also.<sup>6</sup>

§ 367. **Duties of Co-tenants under.** — **Tenant at Will liable only for Waste.** — As between co-tenants, both equally bound to repair, or to support a partition wall or fence, the rule is that either party, if the other refuses to join him in making a necessary repair, may, after giving reasonable notice (in New York it is a month's notice), proceed to do what is necessary to be done, and charge his co-tenant with his proportion of

<sup>1</sup> Sparkes v. Smith, 2 Vern. 275.

<sup>2</sup> Digby v. Atkinson, 4 Camp. 275.

<sup>3</sup> Leeds v. Cheetham, 1 Sim. 146; Ely v. Ely, 80 Ill. 532.

<sup>4</sup> Andrews v. Needham, Noy. 75; s. c. Cro. El. 656.

<sup>5</sup> Carrell v. Reed, Cro. El. 374; Snelling v. Stagg, Bull. N. P. 165; Morrison v. Chadwick, 7 C. B. 266; Newton v. Allin, 1 Q. B. 518.

<sup>6</sup> Douse v. Earle, 3 Lev. 264.

the expense. And if there had once been a division fence between them, which one party has improperly removed, without giving to the other the three months' notice of his intention to let the land lie open required by the statute, he is liable not only for his proportion of the expense of making a new fence, but also to all damages sustained by the other party in consequence of such removal.<sup>1</sup> But as between a tenant and his landlord, it has been decided, that if a tenant under a covenant to repair, pulls down a party-wall (being in a ruinous condition), and rebuilds it, intending to do so at the joint expense of himself and the occupant of the adjoining house, to whom he gave the notice required by statute, but without the landlord's authority, he cannot maintain an action against his landlord for a moiety of the expense of rebuilding such wall.<sup>2</sup> The estate of a tenant at will being uncertain, the law imposes no obligation upon him for dilapidations; the landlord has, therefore, no remedy against such a tenant except for wilful waste, in which case, as we have seen, he forfeits his interest in the estate. He is not bound to repair, and takes no charge upon himself but to occupy and pay rent.<sup>3</sup>

§ 368. **Measure of Damages for Breach of.** — The former rule as to the measure of damages for non-repair when the term was at an end, was the cost of putting them in the repair contemplated by the tenor of the covenant.<sup>4</sup> It was also held that the jury might allow compensation for the landlord's loss of the use of the premises while the repair was being made.<sup>5</sup> But the more modern rule is, that the injury to the market value of the reversion is the true measure.<sup>6</sup> The

<sup>1</sup> 3 Kent, Com. 352; *Richardson v. McDougall*, 11 Wend. 46. The owner of a room on the lower floor of a dwelling-house and the cellar under it is not liable to the owner of the chamber over it, and the rest of the house, for necessary repairs to the roof. *Loring v. Bacon*, 4 Mass. 575.

<sup>2</sup> *Pizey v. Rogers*, Ry. & M. 357.

<sup>3</sup> *Salop v. Crompton*, Cro. El. 777; Co. Lit. 71.

<sup>4</sup> *Vivian v. Champion*, 2 Ld. Ray. 1125; *Penley v. Watts*, 7 M. & W. 601.

<sup>5</sup> *Woods v. Pope*, 1 Bing. (N. C.) 467.

<sup>6</sup> *Coward v. Gregory*, L. R. 2 C. P. 153; *Mills v. E. Lond. Union*, L. R. 8 C. P. 79.

same rule has always prevailed where the tenancy is still subsisting and there is yet a considerable portion of the term remaining; the damages must be estimated, not by considering what it would cost to put the premises into proper repair, but what damage the present want of repair is to the reversion. The former could not be a correct criterion, because the landlord, if he recovered as damages the sum necessary to put the premises in repair, is not bound to lay out any portion of it in repairing them.<sup>1</sup> And where the lessor was bound by covenant to repair "the external parts of a demised house," which was damaged in consequence of the adjoining house being pulled down and the party-wall giving way, the jury gave the plaintiff, as damages, not only the sum he had laid out in building the party-wall, the value of certain damage done by the wall giving way, the cost of painting and papering, rendered necessary by the rebuilding of the wall, the cost of replacing fixtures, and the architect's charges, but also the rent he paid for other premises whilst the wall was rebuilding, besides the cost of such alterations as were necessary to enable him to carry on his business in these latter premises, and the cost of restoring those premises to their original state after the wall was rebuilt. The court, however, upon review, held that the plaintiff was not entitled to these three latter items of damage; because, if the defendant had rebuilt the

<sup>1</sup> *Doe v. Rowlands*, 9 C. & P. 734; *Smith v. Post*, 9 Exch. 161; *Turner v. Lamb*, 14 M. & W. 412. The opposite rule was stated in *Webster v. Nosser*, 2 Daly, 186; but it would seem without sufficient consideration. From *Turner v. Lamb*, *supra*, it appears that the amount of damages may depend on the length of the term, which is still unexpired. It is always competent for a defendant to show the general state and condition of the premises at the time of the demise, without going into matters of detail. *Young v. Mantz*, 6 Scott, 277. The plaintiff being assignee of a lease which contained a covenant to repair, underlet the premises to the defendant upon the terms that he should "maintain them in as good a state as they would be when repaired by him." Shortly after the defendant took possession, the premises, which were old and dilapidated, were destroyed by fire. The jury found that the cost of rebuilding them would be £1,635, but that they would be more valuable by £600. Held, that the defendant was only bound to put the premises in the same state they would have been if he had repaired them before the fire; and consequently that he was liable to pay as damages £1,035 only. *Yates v. Dunster*, 11 Exch. 15.

wall, he would not have been bound to find other premises for the plaintiff during the time the wall was rebuilding.<sup>1</sup> If the action is brought during the term, and the evidence shows that the premises were out of repair when the action was commenced, the lessor is still entitled to nominal damages, although the lessee has since put the premises in repair.<sup>2</sup>

## SECTION II.

### OF THE COVENANT TO PAY RENT.

§ 369. *Rent defined.* — *Whence it issues.* — Rent is a certain profit, either in money, provisions, chattels, or labor, issuing yearly out of lands and tenements, in return for their use.<sup>3</sup>

<sup>1</sup> *Green v. Eales*, 2 Q. B. 225. Another question which relates to the damages recoverable under a covenant to repair arises where there is a lease and an under-lease, both of which contain a covenant to repair, and the superior landlord has sued the lessee on his covenant. *Colley v. Streeton*, 2 B. & C. 273. In *Neale v. Wyllie*, 3 B. & C. 533, it was held that in such case the damages and costs recovered in that action, and also the costs of defending it, might be claimed as special damage in an action by the lessee, against the under-lessee, for the breach of his covenant to repair. The correctness of this decision, however, was doubted in *Penley v. Watts*, 7 M. & W. 601, so far as relates to the costs of the first action, and was overruled by the case of *Walker v. Hatton*, 10 M. & W. 249, where it was held that the costs occasioned by the defence of the first action were not recoverable against the under-lessee, as they were not necessarily caused by the breach of covenant on his part. And see *Smith v. Howell*, 6 Exch. 730; *Pennell v. Woodburn*, 7 C. & P. 117; *Short v. Kalloway*, 11 Ad. & E. 28; *Blyth v. Smith*, 5 Mann. & G. 405.

<sup>2</sup> *Moroney v. Ferguson*, 8 Ir. R. C. L. 551.

<sup>3</sup> A net rent is a sum to be paid to the landlord clear of all deductions. *Bennett v. Womack*, 7 B. & C. 627; s. c. 3 C. & P. 96. Rent is also settled as of the date of the demise. Thus where the rent of a mine was so much per bushel of screened coal, the rate depends on the size of screens at the date of the lease, although the lessee's business may require them to be altered during the lease. Where a right to mine ore or other minerals is granted in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine properly and diligently. *Koch & Bal-*

Some of its properties, at common law, are certainty, or the power of being reduced to a certainty by either party; and that it be a yearly issue, for although it need not issue out of each successive year, yet, as it is to be produced out of the profits of lands and tenements, as a compensation for their enjoyment, it must be renewed yearly, because such profits arise and are renewed annually. It must issue out of the thing demised, and not be part of the thing itself; and necessarily, issues out of lands and tenements corporeal merely, for out of such only can the lessor distrain.<sup>1</sup> It must be originally reserved to the lessor, and is incident to and follows the reversion. It may be afterwards apportioned upon different parcels of the land, and assigned to several parties so as to give to each a right of action in his own name. And if to accrue, may also be severed from the reversion, and assigned by the lessor to other persons, reserving the reversion to himself.<sup>2</sup>

§ 370. **Different Kinds of Rent. — Each defined.** — There are, at common law, three kinds of rent: *rent-service*, *rent-charge*, and *rent-seck*. Rent-service was so called because it had some corporeal service incident to it; as, if a tenant held his lands by fealty and ten shillings rent, or by the service of ploughing the lord's land and five shillings rent; these pecuniary rents, being connected with personal services, were therefore called rent-service, and were always annexed to and connected with a reversionary estate remaining in the grantor.<sup>3</sup> To this species of rent the right of distress was incident, so

liet's Appeal, 93 Pa. St. 434. And the rule applies where the rent is in form of a royalty upon the product of a mill or mine. See *People v. Loomis*, 27 Hun, 328.

<sup>1</sup> Co. Lit. 47, a; 142, a; *Merritt v. Fisher*, 19 Iowa, 354. The courts of Pennsylvania have departed from this doctrine, and hold that rent as such flows from chattels parcel of the demise. See *ante*, § 17, note 3.

<sup>2</sup> *Van Rensselaer v. Hays*, 19 N. Y. 68; *Childers v. Smith*, 10 B. Monr. 235; *Ryerson v. Quackenbush*, 26 N. J. 236.

<sup>3</sup> Where the lease was for ninety-nine years with covenant for perpetual renewal at a fixed yearly rent, it was held that the rent reserved was a rent service, and so apportionable upon the lessee's surrender to the grantee of the reversion of a portion of the land. *Ehrman v. Mayer*, 57 Md. 612.



long as the reversion remained in the landlord. A rent-charge was where the proprietor parted with the fee of his land, but by the grant reserved to himself a certain rent, with a clause authorizing its collection by distress, and it was called a rent-charge because the lands were charged with such distress only by force of the deed, and not of common right;<sup>1</sup> while a rent-seck, or barren rent, was nothing more than a rent reserved by deed, without any right of distress, and which could only be collected by an ordinary action of debt.<sup>2</sup> The difference between these various species of rent, so far at least as regards the remedy for their recovery, is now virtually abolished in England, as it was in New York, even previous to the abolition of distress for rent; since the statutes of both countries authorized all persons to distrain for any certain services, or certain rent, reserved out of any lands or tenements, which shall not have been paid or rendered when due.<sup>3</sup>

§ 371. **Express Covenant usual, but Covenant always implied.** — Besides the reservation of rent in the demise, a special

<sup>1</sup> Of this kind is the rent on the so-called Manor leases in New York; because by the statutes, 1787, re-enacting the principles of the statute *quia emptores*, the rent reserved therein — the demise being in fee — is no longer considered a rent-service. See *Van Rensselaer v. Hays*, *supra*; *Same v. Read*, 26 N. Y. 558; where it is held that conveyances in fee, under a rent-charge, operate as assignments, and not as leases, and leave no reversion in the grantors, and that such a rent is a hereditament, which is assignable and devisable; and see *ante*, §§ 261, 285. Such a rent comes, however, within all the statutory provisions concerning rents. *Van Rensselaer v. Witbeck*, 2 Lans. 498. But on similar demises in fee in Pennsylvania, the rent is held to be a rent-service, as the statute of *quia emptores* never was in force there. It is called a ground rent or fee-farm rent, and forms a lien on the land superior to all conveyances by the tenant. *Brown v. Johnson*, 4 Rawle, 146. The popular objections to many of these leases have been fully examined, and the anti-rent movement in New York freely discussed, by the Hon. D. D. Barnard, in the December number of the *North American Review* for 1845. It is a calm, earnest, and able review of the whole subject, and had an extensive influence in quieting the public agitation which then pervaded the State of New York.

<sup>2</sup> *People v. Haskins*, 7 Wend. 463; *Cuthbert v. Kuhn*, 3 Whart. 357; *Cornell v. Lamb*, 2 Cow. 652; Litt. § 217.

<sup>3</sup> 4 Geo. II. c. 28; 1 R. S. 747, § 18; 3 Kent, Com. 461, n. b.

covenant for its payment is usually inserted;<sup>1</sup> but if there is no agreement between the parties, the law will imply a promise on the part of a tenant to pay the landlord for his permission to occupy the premises, as much as they are reasonably worth; an obligation which is incumbent upon an occupant so long as he continues to hold, without obstruction on the part of the landlord. But although a lessee, during his occupation, or an assignee, while his enjoyment lasts, may, without any covenant, be compelled to pay rent,<sup>2</sup> yet, in the absence of this covenant, he may, by assigning over, discharge himself of all future responsibility.<sup>3</sup> And, as the premises might be transferred to a beggar,<sup>4</sup> an insolvent,<sup>5</sup> or to a person leaving the country (provided the assignment be executed before his departure), the lessor would, to a certain extent, lose his security for the rent;<sup>6</sup> the express covenant, therefore, possesses an obvious advantage over the implied one. For these reasons, a covenant to pay rent is generally contained in every indenture of lease. And as the liability of a lessee on this covenant will not be in any manner impaired or affected by his never taking possession,<sup>7</sup> or by his act of assigning over the lease, but remains valid against him and his executors (having assets), until the end of the lease,<sup>8</sup> the

<sup>1</sup> Sometimes a provision is inserted in a lease, whereby the lessee mortgages all his chattels upon the demised premises, as security for the rent. This is held good as a mortgage of the property on the premises at the time of making the lease; but such a provision in respect to property which might thereafter be brought upon the premises is void in New York, as against the policy of the act to abolish distress for rent. Per Denio, J., in *Van Heusen v. Radcliff*, 17 N. Y. 580.

<sup>2</sup> *Ante*, § 154; *post*, §§ 442-447.

<sup>3</sup> *Pitcher v. Tovey*, 4 Mod. 71; s. c. 12 Mod. 28; *Treackle v. Coke*, 1 Vern. 165; *Staines v. Morris*, 1 V. & B. 11.

<sup>4</sup> *Taylor v. Shum*, 1 B. & P. 21.

<sup>5</sup> *Onslow v. Corrie*, 2 Madd. 330.

<sup>6</sup> *Dalston v. Reeve*, 1 Ld. Ray. 77; *Webb v. Russell*, 3 T. R. 402; *Iggulden v. May*, 9 Ves. 380.

<sup>7</sup> *McGlynn v. Brock*, 111 Mass. 219; *Mech. & Tr. Ins. Co. v. Scott*, 2 Hilt. 550.

<sup>8</sup> *Pitcher v. Tovey*, 1 Salk. 81; *Buckland v. Hall*, 8 Ves. 95; *Snyder v. Middleton*, 4 Phila. 343; *Harmony Lodge v. White*, 30 Ohio St. 569; *Taylor v. De Bus*, 31 *id.* 468; *Field v. Herrick*, 101 Ill. 110. The obliga-

covenant, in the event of a tenant's alienation, affords the landlord a double claim for the payment of his rent; the assignee being chargeable in consequence of his privity of estate, and the original lessee still continuing bound in respect to his contract. This is a covenant running with the land, binding on an assignee of the lease, without his being specially named,<sup>1</sup> and, in the case of an *indenture* executed by the lessee, will arise upon the ordinary words of reservation, *yielding and paying*.<sup>2</sup> It is held, however, that the words, "subject to payment of the rent reserved," etc., in an assignment of a lease, do not amount to a covenant, and give no right of action against the assignee, for they are words of qualification and not of contract.<sup>3</sup>

§ 372. **Express Covenant, effect of.** — When the relation of landlord and tenant has been once established, the tenant cannot resist a demand of rent, unless he shows that he was evicted by the landlord, or otherwise legally entitled to quit possession, and has done so in an unqualified manner; or that the landlord has accepted another person as tenant in

tion of a lessee is primary and absolute, and that of a guarantor secondary and conditional; and these obligations are separate and not joint, and will not support a joint action by the lessor against the lessee and the guarantor, when in separate instruments. *Tibbits v. Percy*, 24 Barb. 39.

<sup>1</sup> *Main v. Feathers*, 21 Barb. 646; *Dolph v. White*, 12 N. Y. 296. An assignment by the lessor of the rent of leasehold premises, creates such a privity of estate between the assignee and the lessee, that the former may maintain a suit in his own name for the rent, which accrues and becomes payable, while such privity of estate exists. *Childs v. Clark*, 3 Barb. Ch. 52.

<sup>2</sup> *Holford v. Hatch*, 1 Doug. 183; *Vyvyan v. Arthur*, 1 B. & C. 416. An annual rent reserved by deed, upon a grant in fee, is held, in New York, to be valid as a rent-charge; and is a covenant running with the land, binding upon the heir or assignee, independent of any tenure or reversion. *Van Rensselaer v. Hays*, 19 N. Y. 68.

<sup>3</sup> *Wolveridge v. Steward*, 3 Tyrw. 637; s. c. 1 Cr. & M. 644. A landlord agreed that the lessee should spend £200 in repairs, to be inspected and approved of by the lessor, to be done in a substantial manner, the lessee to be allowed to retain the sum out of the first year's rent. Held, that the lessor's approval was not a condition precedent to the lessee's retaining the rent. *Dallman v. King*, 4 Bing. (N. C.) 105.

his stead.<sup>1</sup> And no accident to the demised property, or misfortune to the lessee through the casualties of war or otherwise, will relieve him from his express covenant, so long as this relation continues. In an ancient case, which occurred during the civil wars of England, the tenant objected, as a reason why he should not pay rent, that Prince Rupert, an alien born, with a hostile army, had driven him out of possession of the premises; but the court determined that, though the whole army had been alien enemies, he was still bound to pay his rent, because he had expressly covenanted to that effect.<sup>2</sup> And, if the land be surrounded or gained upon by the sea, or in any other way rendered useless, still, as the lessee is to have the advantage of all profits, he must run the hazard of casual losses, and will be liable for the whole rent.<sup>3</sup> And, though the premises may be destroyed by unavoidable accidents of fire, flood, or tempest,<sup>4</sup> the tenant is still liable at

<sup>1</sup> *Ward v. Mason*, 9 Price, 294; *Dyer v. Wightman*, 66 Pa. St. 425; *Snyder v. Middleton*, *supra*; *Cleves v. Willoughby*, 7 Hill, 83. That the title to the premises is in dispute and undetermined is no defence to an action on the covenant for rent. *Moffat v. Sydnor*, 13 Tex. 628. And a tenant is not permitted to avoid his contract on the ground of fraud, and yet retain possession of the premises. *McCarty v. Ely*, 4 E. D. Smith, 375.

<sup>2</sup> *Paradine v. Jane*, Aleyn, 26. To the same effect are *Wagner v. White*, 4 Har. & J. 564; *Kramer v. Cook*, 7 Gray, 550; *Coy v. Downie*, 14 Fla. 544. It has been held, however, in South Carolina, that where a tenant has been dispossessed by an enemy, he ought to pay rent only for the time he peaceably enjoyed, and not for the time he was prevented by the casualties of war. *Bayley v. Lawrence*, 1 Bay, 499.

<sup>3</sup> *Richard le Taverner's Case*, *Dyer*, 56, a; *Peck v. Ledwidge*, 25 Ill. 109. So held also in respect to a wharf which was partially destroyed by natural decay. *Hill v. Woodman*, 14 Me. 38.

<sup>4</sup> *Hallett v. Wylie*, 3 Johns. 44; *Fowler v. Bott*, 6 Mass. 63; *Linn v. Ross*, 14 Ohio, 412; *Hilliard v. Gas Coal Co.*, 41 Ohio St. 662; *Monk v. Cooper*, 2 Ld. Ray. 1477; *Belfour v. Weston*, 1 T. R. 310; *Medwin v. Sandham*, 3 Swanst. 685. In *Ripley v. Wightman*, 4 McCord, 447, it was held that, where a hurricane rendered a house untenable, this was a good defence to an action for rent. But this, as well as the other South Carolina case, are evidently exceptions to the general rule of law that when a man takes a charge upon himself, by his own special agreement, he is still liable in damages resulting from a non-performance, although its performance should become impossible: it is of course otherwise where the law creates a duty or implies a liability, for there the party is dis-

common law to pay rent under his express covenant, notwithstanding their ruinous condition.<sup>1</sup>

§ 373. **Express Covenant Strictly Construed.** — Covenants implied by operation of law admit of a more liberal construction, and may be moulded according to the dictates of reason and justice; but express covenants are to be construed strictly, and the person contracting not only assumes to do the thing stipulated, but takes on himself all risk of performance.<sup>2</sup> An exception of casualties by fire, introduced into the covenant to repair, will not change the case, since the exception has no relation to the covenant to pay rent.<sup>3</sup>

§ 374. **Recoupment in Action on Covenant to pay Rent.** — According to the strictness of the ancient law, a tenant could not, in a suit for rent, set up in defence that the landlord had broken his covenant to repair; because the covenants were independent. The amount of damages sustained by the tenant being also uncertain, could only be made the subject of a cross-action, and was, therefore, incapable technically of being set off against the demand for rent, which is a certain fixed amount.<sup>4</sup> But it is now a generally recognized principle that

charged from the obligation, if performance becomes impossible; nor would he, in such case, be bound to pay rent, if he had no beneficial enjoyment of the premises.

<sup>1</sup> *Monk v. Cooper*, 2 Stra. 763; *Holtzapffel v. Baker*, 18 Ves. 115; *Hare v. Groves*, 3 Anstr. 687; *Arden v. Pullen*, 10 M. & W. 321; *Trench v. Richards*, 6 Phila. 547; *Cowell v. Lumley*, 39 Cal. 151; *Warren v. Wagner*, 75 Ala. 188; *Harrison v. Lord North*, 1 Ca. in Ch. 83; *Richard le Taverner's Case*, *supra*. So where rent is paid in advance, *Diamond v. Harris*, 33 Tex. 134; *Cross v. Button*, 4 Wisc. 468. Or the lessor has collected the insurance-money and refuses to rebuild. *Bussman v. Ganster*, 72 Pa. St. 285. And the guarantor of the lessee is equally held. *Kingsbury v. Westfall*, 61 N. Y. 356. In England and Kentucky the same rule is applied to the tenant of a part of a house. *Izon v. Gorton*, 5 Bing. (N. C.) 501; *Helburn v. Mofford*, 7 Bush, 169. But the American law is otherwise. *Post*, § 520, and cases cited.

<sup>2</sup> *Warren v. Powers*, 5 Conn. 381; *Bohannon v. Lewis*, 3 T. B. Monr. 376.

<sup>3</sup> *Belfour v. Weston*, 1 T. R. 310; *Pindar v. Ainsley*, *id.* 312; *Doe v. Sandham*, *id.* 710. See *Leavitt v. Fletcher*, 10 Allen, 119.

<sup>4</sup> *Watts v. Coffin*, 11 Johns. 495; *Weigall v. Waters*, 6 T. R. 488. In an action on the lessee's covenant to pay rent, the lessee cannot *set off* his

a defendant need not resort to a cross-action on the plaintiff's contract of indemnity in any case, but may set up his damages or counter-claim, by way of extinguishing or reducing the plaintiff's demand. If the demands of both parties issue out of the same contract or transaction, the defendant is allowed to *recoupe*,<sup>1</sup> although the damages on both sides are unliquidated; but he can *set off* only where the demands of both parties are liquidated, or capable of being ascertained by calculation. It was formerly supposed that there could only be a recoupment where some fraud was imputed to the plaintiff, in relation to the contract on which the action was founded; but the doctrine is now applied to cases where the defendant imputes no fraud, and only complains that there has been a breach of contract on the part of the plaintiff. And, for the purpose of avoiding circuity, or multiplicity of action, they are allowed — and compelled, if the defendant so elect — to adjust all their claims growing out of the same contract in one action. The defendant, however, may elect whether he will set up his claim in answer to the plaintiff's demand, or resort to a cross-action. But whatever may be the amount of his damages, he can only set them up, if uncertain, by way of abatement, either in whole or in part, of the plaintiff's demand; he cannot, as in case of a set-off, go beyond that, and have a balance certified in his favor. And if a plaintiff sues on one part of a contract, consisting of mutual stipulations made at the same time and relating to the same subject-matter, the defendant may recoup his damages arising from the breach of another part; and this, whether the different parts be contained in one instrument or in several, or where one part is in writing and the other verbal, or whether the damages are liquidated or not.<sup>2</sup>

claim on the lessor's covenant to pay him for improvements at the end of the term. *Tuttle v. Tompkins*, 2 Wend. 407. Nor the interest due on the lessor's mortgage to him. *Scott v. Fritz*, 51 Pa. St. 418. The subject of a set-off to demands for rent is further discussed in those parts of the work which treat of actions for rent, — § 630, &c. And see *ante*, § 329.

<sup>1</sup> *Recoupe*, to keep back something that is due, but which there is an equitable reason to withhold. *Ives v. Van Epps*, 22 Wend. 165; *Westlake v. Degraw*, 25 *id.* 669; *Reab v. McAlister*, 8 *id.* 109.

<sup>2</sup> *Batterman v. Pierce*, 3 Hill, 171; *Ives v. Van Epps*, *supra*; *Van Epps v. Harrison*, 5 Hill, 63; *Barber v. Rose*, *id.* 76; *Whitbeck v. Skinner*,

§ 375. **Tenant bound by express Covenant although Tenement is Destroyed by Fire.** — That a tenant is bound to continue the 7 *id.* 53; *Nichols v. Dusenbury*, 2 N. Y. 283; *Mayor v. Mabie*, 13 *id.* 151; *Wright v. Lattin*, 38 Ill. 293; *Lunn v. Gage*, 37 *id.* 19; *Myers v. Burns*, 85 N. Y. 269. In *McBride v. Daniels*, 92 Pa. St. 332, the lessor was permitted to recoup damages arising from a breach of the tenant's covenant to leave the premises in good condition, in the tenant's action for the price of crops taken by the lessor at a valuation fixed in the lease. In California the tenant cannot counterclaim in the statutory action for unlawful detainer. *Van Every v. Ogg*, 59 Cal. 563; *Kelly v. Teague*, 63 *id.* 68. In New Jersey, it seems that recoupment is not allowed in any case, and so is not permitted as between landlord and tenant. *Hunter v. Reiley*, 14 Vroom, 480. The doctrine of recoupment is of recent growth, hardly preceding in its origin the beginning of the present century. 7 *Am. Law Rev.* 389. The decisions thereon are as yet somewhat conflicting, but certain principles seem substantially settled. Recoupment is in the nature of a cross action for an unliquidated amount. A defence therefore which is pleadable in bar, like eviction, is not available by way of recoupment. *Nichols v. Dusenbury*, 2 N. Y. 283; *Dunwoody v. Raynor*, 52 Pa. St. 292. This is otherwise by statute in some States; *McKesson v. Mendenhall*, 64 N. C. 286; and perhaps in England, since the procedure act: see *Mostyn v. W. M. Coal Co.*, 1 L. R. C. P. Div. 145; and has sometimes been overlooked: *Holbrook v. Young*, 108 Mass. 83, 85; *Grabenhorst v. Nicodemus*, 42 Md. 236, where the same defence was regarded as either eviction or recoupment. But where the landlord's acts or defaults in respect of the demised estate go to diminish the tenant's enjoyment of it, they may be the subject of recoupment. Thus, for depriving tenant of an easement: *Depuy v. Silver*, 1 Clark, Pa. 385; or of the use of an adjoining well: *Lynch v. Baldwin*, 69 Ill. 310; or for removing a fence around the premises: *Abrams v. Wilson*, 59 Ala. 524; or for breach of a covenant to heat: *Elwood v. Forkel*, 35 Hun, 202; or failure to repair: cases *supra*; *Block v. Ebner*, 54 Ind. 544; *Leach v. Leach*, 10 *id.* 271; *Fairman v. Fluck*, 5 Watts, 516; *Smart v. Allegaert*, 14 Phila. 179; *Breese v. McCann*, 52 Vt. 490; *Kiernan v. Germain*, 61 Miss. 498; *Culver v. Hill*, 68 Ala. 66; *Lewis v. Chisholm*, 68 Ga. 40. It is held that the tenant's damages in such a case will be limited to the amount which it would have cost him to repair. *Varner v. Rice*, 39 Ark. 344; but see *Green v. Bell*, 3 Mo. App. 291; *Vandegrift v. Abbott*, 75 Ala. 487. In *Norris v. Tharp*, 65 Ind. 47, where the lessor was guilty of fraudulently and falsely representing that the property was fit for the lessee's purposes, it was held that the lessee might counterclaim the damages thereby occasioned him in the lessor's action for the consideration of the lease. In some States a more rigid rule is applied, and acts of trespass are not regarded as growing out of the contract of demise: *Bartlett v. Farrington*, 120 Mass. 284; even when the action is for use and occupation: *DeWitt v. Pierson*, 112 *id.* 8; and see *Edgerton v. Page*, 20 N. Y. 281; though



payment of rent after the destruction of the tenement by fire or other external violence, and has no relief against an express covenant to pay rent, is therefore a proposition generally true, in every case where he has not protected himself by a saving clause in the lease.<sup>1</sup> It was early held, after elaborate consideration, that it was well settled that a lessee had no relief under those circumstances, either at law or in equity. In this case, indeed, an agreement that the rent should cease if the building should be casually destroyed, and that a stipulation to that effect should be inserted in the lease, was inadvertently omitted by the negligence of the person employed to prepare the lease, and the premises were afterwards accidentally burned. The lessor was, therefore, perpetually enjoined from attempting to recover the rent which accrued subsequent to the destruction of the premises; and the lease itself was ordered to be given up and cancelled.<sup>2</sup> And it is to be observed that all

an action for a breach of either the covenant of quiet enjoyment, or that of repair, would seem to lie, — the court saying, in *Holbrook v. Young*, *supra* (p. 85): “He may set up by way of recoupment damages suffered by reason of the breach of any covenant in the same instrument on the part of the lessor.” Where, however, the rent was appropriated to a third party before the lease, *Ardesco Oil Co. v. N. A. Oil Co.*, 66 Pa. St. 375; or is held *in alieno jure*; *Slingerly v. Fox*, 75 *id.* 112, no recoupment or set-off can arise.

<sup>1</sup> *Gates v. Green*, 4 Paige, 355; *Welles v. Castles*, 3 Gray, 323; *Gibson v. Perry*, 29 Mo. 245; *Procter v. Keith*, 12 Ky. 252; *Holtzapffel v. Baker*, 18 Ves. 115; s. c. 4 Taunt. 45; *Leeds v. Cheetham*, 1 Sim. 146; *Lamott v. Sterett*, 1 Har. & J. 42; *Philips v. Stevens*, 16 Mass. 240; *Howard v. Doolittle*, 3 Duer, 464; *Cross v. Button*, 4 Wisc. 468; *Ely v. Ely*, 80 Ill. 532; *Harris v. Heackman*, 62 Iowa, 411; *Lewis v. Chisholm*, 68 Ga. 40. In Kansas, it is doubted whether the common-law rule is in force. *Whitaker v. Hawley*, 25 Kan. 674. As to the *dicta* that the lessor's covenant to rebuild is a condition precedent to rent, see *ante*, § 331, n. But where the lessee insures agreeing to rebuild, and, at the lessor's request gives him the money, the lessor must rebuild before he can recover any rent. *Boyer v. Dickson*, 7 Phila. 190. A lessee, however, is not liable for rent, where the premises have been destroyed, after the execution of the lease, but before the commencement of the term, and before he has taken possession; for the delivery of possession is necessary to establish the landlord's right to collect rent. *Wood v. Hubbell*, 10 N. Y. 479.

<sup>2</sup> *Gates v. Green*, *supra*. In this case, the learned Chancellor refers to the law of Scotland that, upon the hire of property, a loss or injury to such property, not caused by the fault of the hirer, falls on the owner;

such cases depend upon the express agreement of the parties, — the general rule of law being that, when the law creates a duty or charge, and the party is disabled from performing it, without his fault, and he has no remedy over against some other person, the law will excuse him; but when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or inevitable necessity; because he might have provided against it by his own contract, but did not think proper to do so.<sup>1</sup> But subsequent legislation in New York has, as before intimated, modified this rule of law.<sup>2</sup>

and the lessee is entitled to an abatement of the rent, proportioned to any partial destruction of the subject. The Code Napoleon, Art. 1722, also declares that if the thing hired is destroyed by fortuitous events, during the continuance of the lease, the contract of hiring is rescinded; but if it be only destroyed in part, the lessee may, according to circumstances, demand either a diminution of the price or the rescinding of the lease itself. The same provision, substantially, is found in the Code of Louisiana, Art. 2667. Puffendorf also refers to a law of Sesostrius, that, if the violence of the river should wash away a part of the land, the rent should be proportionably abated. By the custom of Newfoundland also, the tenant of a building may surrender his lease, and be excused from further rent, in a case of casual destruction of the building by fire. And Rutherford, in his lectures on natural law, distinguishes between a casualty which destroys the value of the use of the property, which loss naturally falls on the lessee, and one which destroys the property itself, of which the lessee has hired the use; in which latter case he holds that the lessee is excused from the payment of further rent. Some of the English Chancellors also strove to introduce this principle into the administration of justice in their courts. *Brown v. Quilter*, Amb. 619; *Steel v. Wright*, 1 T. R. 708. A contrary principle, however, early prevailed in the Equity Courts of England, as well as in the courts of law. But the rule in the text must now be considered as settled law. In Kansas, however, it has been held, where, by a single instrument, real and personal property, as machinery and fixtures, are leased for a gross rental, and the personalty is a substantial part of the leased property, that, on the total destruction of such property, the lessee is entitled to a proportionate abatement of the rental. *Whitaker v. Hawley*, 25 Kan. 674.

<sup>1</sup> *Beale v. Thompson*, 3 B. & P. 420; *ante*, § 372. For on an express covenant rent continues payable, no matter what may befall the premises. *Peck v. Ledwidge*, 25 Ill. 112.

<sup>2</sup> Laws of New York, 1860, c. 845. A defective flue, which the landlord is bound to keep in order, is sufficient ground for abandoning apartments in a tenement house under this act; *Thomas v. Nelson*, 69 N. Y.

§ 376. **Stipulations in the Lease for Benefit of the Tenant.** — It is proper, therefore, that a tenant should provide in his lease for a suspension of rent during such time as the premises may remain uninhabitable, by reason of accidental fire, or other casualty.<sup>1</sup> But a provision in a lease, that the rent shall cease if the premises become uninhabitable by reason of *fire or other casualty*, does not extend to gradual decay,<sup>2</sup> or to the case of a building which becomes untenable in consequence of a portion of it being taken down, to conform to an

118, where it is provided that the tenant may surrender his tenement if rendered untenable by the elements or other casualty without his fault, and thereafter be relieved from rent. *Fash v. Kavanagh*, 24 How. Pr. R. 347. So defective plumbing, by which malodorous or poisonous gas escapes into the tenement. *Bradley v. Goicouria*, 67 How. Pr. 76; s. c. 14 Abb. N. C. 53. This statute applies only where the injury or destruction occurs after the lessee's entry, and not where it existed at or before that time. *Bloomer v. Merrill*, 1 Daly, 485; *Murray v. Waller*, 42 How. Pr. R. 64. The statute, of course, applies only to the sudden and unexpected action of the elements, and not to a gradual deterioration; and tenant must still make all ordinary repairs. *Suydam v. Jackson*, 54 N. Y. 250; *Johnson v. Oppenheimer*, 55 *id.* 280. And see *Wall v. Hinda*, 4 Gray, 256. An intention to waive the benefit of the statute may be gathered from the terms of the lease without an express covenant of waiver. *Butler v. Kidder*, 87 N. Y. 98; and see *Varen v. Rouse*, 94 *id.* 401. The statute does not abrogate the common-law rule requiring the tenant to make ordinary repairs; and if through his neglect to make such repairs the premises become untenable, he cannot abandon them under the act. *Sheary v. Adams*, 18 Hun, 181. Upon abandonment, the tenant is entitled to reasonable time within which to remove his property. *Bassett v. Dean*, 34 Hun, 250. In Louisiana, where a lessor is bound to repair, his omission to do so will not, where the rent is sufficient to enable the tenant to make them, and deduct his expenditure from the rent, authorize a rescission of the lease, or an action for damages. *Scudder v. Paulding*, 4 Rob. (La.) 428.

<sup>1</sup> *Minot v. Joy*, 118 Mass. 308; and such a provision applies also to rent in advance. *Rich v. Smith*, 121 Mass. 328. On a covenant to abate rent in case of "inevitable accident" it was held that the words imported something *ejusdem generis* with what had been mentioned previously, and did not apply to that which, though not avoidable as far as the lessee was concerned, was not in its nature inevitable. *Saner v. Bilton*, 7 Ch. D. 815.

<sup>2</sup> *Hatch v. Stumper*, 42 Conn. 28. But if the deterioration is a result of the fire, this will be within the purview of this stipulation. *Cary v. Whiting*, 108 Mass. 363.

order of a municipal corporation for the widening of the street on which it is situated.<sup>1</sup> And the mere fact that a sub-tenant continues to occupy a portion of it after a fire is not conclusive evidence that the premises are tenantable, for such occupation may be explained.<sup>2</sup> At common law, however, a lessee who is under a covenant to pay rent and repair, without an express exception on his part of all casualties by fire or tempest, is liable to pay rent upon his covenant, although the premises are burnt down and not rebuilt by the lessor, after he is notified of the accident and required to rebuild; for, whatever was the default of the lessor in not rebuilding, he is liable for damages to the lessee; and, although it may be a hard case, yet the lessee must, at all events, perform his covenant, by which he was expressly bound to pay rent during the term.<sup>3</sup>

**§ 377. Implied Covenant of Quiet Enjoyment. — Eviction by Title Paramount.** — The quiet enjoyment of the premises without any molestation on the part of the landlord is an implied condition on which the tenant is bound to pay rent.<sup>4</sup> Rent is something given by way of compensation to the lessor, for the right to make use of the land demised; and, consequently, the landlord's claim for rent depends upon this, that, so far as he is concerned, the land is possessed and enjoyed by the tenant during the term specified in his contract. And, therefore, it would be no defence to an action for rent that the lessee never took possession, unless possession was withheld by the lessor

<sup>1</sup> *Mills v. Baehr's Executors*, 24 Wend. 254. But if the lease is in writing, this provision is inoperative if parol. *Martin v. Berens*, 67 Pa. St. 459. And see *Phyfe v. Eimer*, 45 N. Y. 102. The rupture of a steam-boiler, while in use under a low pressure of steam with a moderate fire, was held to be an unavoidable casualty, within the provisions of a lease for an abatement of rent until the injury arising from such casualty could be repaired by the lessor. *Phillips v. Sun Dye Co.*, 10 R. I. 458.

<sup>2</sup> *Kip v. Mervin*, 52 N. Y. 542.

<sup>3</sup> *Paradine v. Jane*, Aleyn, 26; *Chesterfield v. Bolton*, Com. 627; *Bullock v. Dommitt*, 6 T. R. 650.

<sup>4</sup> *Ante*, § 305. Rent is due when it depends alone on the will of the hirer or lessee to enjoy the thing hired, or when he has not been prevented from enjoying it by the lessor. *Tio v. Vance*, 11 La. 200.

or another, under a title paramount to that of the lessor.<sup>1</sup> But if the tenant be at any time deprived of the premises, in whole or in part, by the landlord's agency, the obligation to pay rent ceases, because his obligation has force only from the consideration, which is the quiet enjoyment of the premises.<sup>2</sup> It also follows that if the whole land be recovered from the tenant by a third person by a title superior to that of the lessor, the tenant is discharged from the payment of rent after the eviction.<sup>3</sup> Thus, the foreclosure and sale of the premises, under a mortgage made prior to the lease, are equivalent to an eviction by title paramount, and will bar the lessor's action for rent; for the lessee's possession after foreclosure is not a matter of right, nor is he bound to attorn to the purchaser.<sup>4</sup>

<sup>1</sup> *McGlynn v. Brock*, 111 Mass. 219; *Mech. & Tr. Ins. Co. v. Scott*, 2 Hilt. 550; *Moffat v. Strong*, 9 Bosw. 57; *Field v. Herrick*, 10 Bradw. (Ill.) 591.

<sup>2</sup> *Leopold v. Judkins*, 75 Ill. 536; *Poston v. Jones*, 2 Ired. Eq. 350, *Colburn v. Morrill*, 117 Mass. 262. An eviction in fact or in effect, which renders the premises useless, will prevent a recovery of rent. *Halligan v. Wade*, 21 Ill. 470. A leading case on what will constitute an eviction is *Upton v. Townend & Greenlees*, 17 C. B. 30. Here the lessor, under his covenant to restore, rebuilt two houses destroyed by fire, altering both by diminishing one and enlarging the other; and it was held an eviction of both tenants, though both houses were much improved. There was no subsequent occupation by the tenants; but, as there was a physical ouster, this does not seem material. But see *Campbell v. Shields*, 11 How. Pr. R. 565. An eviction was defined as "not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the premises as they were demised." Thus the use by the landlord of the tenant's rooms, temporarily on one or more occasions, in the tenant's absence, is not an ouster. *Way v. Myers*, 64 Ga. 760. And again, "an act of permanent character, done by the landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the thing demised or a part of it." This definition has since been generally adopted. *Royce v. Guggenheim*, 106 Mass. 201; *Hayner v. Smith*, 63 Ill. 430; *Lynch v. Baldwin*, 69 *id.* 210. Where, accordingly, premises were burned, and before the expiration of the term the landlord executed a new lease to another, it was held an eviction. *Dobbins v. Duguid*, 65 Ill. 464; and see *ante*, §§ 305-315, and § 329, and *post*, § 378, for other instances.

<sup>3</sup> *Blair v. Claxton*, 18 N. Y. 509; *Holbrook v. Young*, 108 Mass. 83. See *Williams v. McMichael*, 64 Ga. 445; *Perry v. Wall*, 68 *id.* 70.

<sup>4</sup> *Simers v. Saltus*, 3 Den. 214. See *Home L. I. Co. v. Sherman*, 46

But an eviction from either the whole or part of the demised premises will have no effect upon rent due at the time of the eviction; for the landlord is still entitled to collect whatever rent has accrued before the tenant actually quits the possession.<sup>1</sup> So, if rent is payable quarterly in advance, an eviction during the quarter, but after the rent becomes due, does not bar an action for rent; the most an evicted tenant can equitably claim under these circumstances is a deduction for so much of the quarter as elapses after his eviction.<sup>2</sup>

§ 378. **Eviction by Paramount Title from part of Land, Effect of.**—If, however, only part of the land is recovered by the paramount title, such an eviction is a discharge of so much of the rent as is in proportion to the value of the land from which the tenant has been evicted.<sup>3</sup> But if the lessor himself wrongfully deprives the tenant of any part of the demised premises, the tenant is discharged from the payment of the whole rent, until the possession of the part taken is restored.<sup>4</sup> And the

N. Y. 370; *ante*, § 121, and notes, and *Peck v. Knickerbocker Ice Co.*, 18 Hun, 183.

<sup>1</sup> *Kessler v. McConachy*, 1 Rawle, 435; *Baynton v. Bobbet*, 2 Vent. 68; *Stokes v. Cooper*, 3 Camp. 514, n.; *Neale v. Mackenzie*, 1 M. & W. 747; *Selby v. Browne*, 7 Q. B. 620; *Pepper v. Rowley*, 73 Ill. 262; *Fitchb. Man. Co. v. Melven*, 15 Mass. 268; *Edgerton v. Page*, 20 N. Y. 281; *Leary v. Meier*, 78 Ind. 393; *Hunter v. Reiley*, 14 Vroom, 480; and see *Salmon v. Smith*, 1 Saund. 204, n.; *McKeon v. Whitney*, 3 Den. 452. And the rule is the same although the rent is payable in advance, and the eviction occurs before the expiration of the period in respect to which the rent claimed accrues. *Giles v. Comstock*, 4 N. Y. 270.

<sup>2</sup> *Whitney v. Meyers*, 1 Duer, 266; and see *Cram v. Dresser*, 2 Sandf. 120; *Carter v. Burr*, 39 Barb. 59. A tortious entry of the landlord suspends the rent during the time the tenant is kept out of possession, but if he regains possession the rent revives. *Mackerbin v. Whitcroft*, 4 H. & McH. 135.

<sup>3</sup> *Lansing v. Van Alstyne*, 2 Wend. 561; *Stevenson v. Lambard*, 2 East, 575; *Carter v. Burr*, 39 Barb. 59; *Fillebrown v. Hoar*, 124 Mass. 580.

<sup>4</sup> *Graham v. Anderson*, 3 Harringt. 364; *Bennet v. Bittle*, 4 Rawle, 839; *Seabrook v. Moyer*, 88 Pa. St. 417; *Walker's Case*, 3 Co. 22; *Lloyd v. Tomkins*, 1 T. R. 671; *Salmon v. Smith*, 1 Saund. 202-204, n. 2; *Lewis v. Payn*, 4 Wend. 423; *Chatterton v. Fox*, 5 Duer, 64; *Fitchb. Man. Co. v. Melven*, 15 Mass. 268; *Colburn v. Merrill*, 117 *id.* 262; *Day v. Watson*, 8 Mich. 535; *Halligan v. Wade*, *supra*; *Tunis v.*



reason why there will be no apportionment of rent in the latter case is said to be that it is done by the wrongful act of the landlord himself; for that no man should be encouraged to disturb a tenant in the possession of that which, by the policy of the law, he ought to protect and defend, and the tenant is not liable, even in use and occupation, if he remains in possession of part.<sup>1</sup> While the reason for the exception to the rule, where part is recovered by a paramount title, seems to be that in this case the landlord is not so far in fault as that he should be deprived of some return for that part of the premises which remains in the tenant's possession.<sup>2</sup> It is also an eviction from part, if, at the time of entry by the lessee, the lessor can only deliver part of the land, or part of the land is in the possession of a third party, under a prior demise from the same landlord, extending beyond the period of the second demise; the demise of the part leased to another will be wholly void.<sup>3</sup> Upon the principle that a tenant shall not be required to pay rent, even for the part of the premises which he retains, *if he has been evicted* from the other part by the landlord, it has been held that if a landlord without the consent of his

Grandy, 22 Gratt. 109; *People v. Gedney*, 10 Hun, 151; *Smith v. Stigleman*, 58 Ill. 141; *Hayner v. Smith*, 63 *id.* 430; *Skaggs v. Emerson*, 50 Cal. 3; *Royce v. Guggenheim*, 106 Mass. 201; *Fillebrown v. Hoar*, 124 *id.* 580; *Collins v. Karatovsky*, 36 Ark. 316. Thus in *Sherman v. Wilkins*, 113 Mass. 481, the erection of a wall under the eaves of the premises demised was an eviction. But such partial eviction does not terminate the lease, and the tenant, if he continues to occupy, is still liable on the other covenants than that for rent. *Morrison v. Chadwick*, 7 C. B. 266.

<sup>1</sup> *Lewis v. Payn*, *supra*; *Etheridge v. Osborn*, 12 Wend. 529; Co. Lit. 148, b. In *Leishman v. White*, 1 Allen, 489, it was said that no recovery could be had on the lease because of the eviction, nor in use and occupation for the part retained, as the contract is still in force. So *Grundin v. Carter*, 99 Mass. 15.

<sup>2</sup> *Lawrence v. French*, 25 Wend. 443; *Ludwell v. Newman*, 6 T. R. 458; *Tomlinson v. Day*, 2 Br. & B. 680.

<sup>3</sup> *Briggs v. Hale*, 4 Leigh, 484; *Christopher v. Austin*, 11 N. Y. 216; *Shumway v. Collins*, 6 Gray, 227; *Neale v. Mackenzie*, 1 M. & W. 747; *Blair v. Claxton*, 18 N. Y. 529; *Vaughan v. Blanchard*, 1 Yeates, 175; *Griffith v. Hodges*, 1 C. & P. 419; *Walker v. Tucker*, 70 Ill. 527. Here the lessee had been in possession of the residue for six years. In *Tunis v. Grandy*, 22 Gratt. 109, it is intimated that he would be liable for the part retained.



tenant, uses privileges appurtenant to the premises, and which are not expressly reserved in the lease, he is not entitled to collect rent.<sup>1</sup> And where the tenant is excluded from a portion of the premises, but remains in possession of the residue thereof, not only is rent suspended until possession is restored but the tenant may claim damages for the diminished value of his lease.<sup>1</sup>

§ 379. **Eviction, in what it consists.** — An eviction consists in taking from a tenant some part of the demised premises of which he was in possession, not in refusing to put him in possession of some privilege which, by the agreement, he ought to have enjoyed, but has not been permitted to do; the omission of a landlord, therefore, to perform his covenants, does not amount to an eviction, and is no bar to a lessor's claim for rent; the lessee's remedy is by an action to recover damages for a breach of the covenant.<sup>2</sup> Yet where the landlord let an unfinished house, and agreed to finish it by a certain day, but did not, it was held that the tenant was not bound to occupy the house; although, if he had occupied it, it was conceded he would have been bound to pay the stipulated rent, for that possession subjects a tenant to the payment of rent,

<sup>1</sup> *Townsend v. Nickerson Wh. Co.*, 117 Mass. 501; *Sherman v. Wilkins*, 113 *id.* 481; *Hegeman v. McArthur*, 1 E. D. Smith, 147. But not to the extent of the injury he may sustain in his business; for the damages in such case will be proportioned to the measure of value between the property lost and the property retained. *Id.* But see *Dobbins v. Duguid*, 65 Ill. 464; *Dalton v. Boker*, 6 Nev. 190. This last was the case of a diminution of the waters of an irrigating creek.

<sup>2</sup> *Etheridge v. Osborn*, 12 Wend. 529; *Warren v. Wagner*, 75 Ala. 188; *Chicago Legal News Co. v. Browne*, 103 Ill. 317. The rent of four houses, demised for a term of years, being in arrears, and the lessee having assigned his lease, and two of the houses being unoccupied, the lessor took possession of these two, by putting a person in possession, under a parol agreement to grant a lease of the four houses as soon as possession of the other two could be obtained. Held, that taking possession of the two unoccupied houses did not amount to an eviction. *Wheeler v. Stevenson*, 6 H. & N. 155. Where the landlord sued for rent and attached the tenant's personal property on the leased premises, which property the tenant permitted to remain without demanding its surrender, it was held that the levy of the attachment and possession of the premises thereunder did not amount to an eviction. *Daniels v. Lyon*, 47 Iowa, 395.

unless there has been an eviction.<sup>1</sup> Neither can a lessee claim a deduction from the stipulated rent by reason of a contemporaneous parol agreement to make improvements during the term, which would render the use of the demised premises more valuable; such an agreement can only be shown in case there was fraud in making the lease, or in obtaining its execution.<sup>2</sup> So where a lessor commanded the breaking down of a partition wall in the house demised, it was held not to amount to a re-entry.<sup>3</sup> And where there was a lease of three rooms in a building, together with a landing on a navigable canal, embracing a front of two hundred feet, and the lessee thereby covenanted to pay a certain annual rent, *so long as he should be permitted to occupy the premises*, it was held that the destruction of the rooms by fire was not embraced in the qualification contained in the covenant; and that, to entitle the defendant to a discharge from the rent, he should have shown a surrender of the *whole* of the premises; for that, while he remained in possession of any portion of the premises, he could claim only a *pro rata* reduction of rent for the part which had been destroyed.<sup>4</sup>

§ 380. **Mere Entry without Eviction does not relieve from Covenant.** — Any other mere entry upon the premises by the landlord, without an eviction, does not discharge the rent; for the landlord, in such case, is at most only a trespasser.<sup>5</sup>

<sup>1</sup> *Allen v. Pell*, 4 Wend. 505. So *Wright v. Lattin*, 38 Ill. 292; where the condition precedent of repair by the lessor was waived by lessee's entry.

<sup>2</sup> *Mayor v. Price*, 5 Sandf. 542; *Tibbits v. Percy*, 24 Barb. 39.

<sup>3</sup> *Harrison's Case*, Clayt. 34; *Smith v. Raleigh*, 3 Camp. 513.

<sup>4</sup> *Willard v. Silliman*, 19 Wend. 358. So where, before the first of May, a person leased a store and dwelling for one year from that day, rent payable quarterly in advance, the store and dwelling to be erected and completed by that day, the upper story to be finished into a dwelling; and the tenant entered into possession and remained until the second quarter's rent fell due, and then abandoned the premises; it was held to be no objection to the collection of rent, that the premises were untenable in consequence of the building not being completed by the landlord according to the agreement. *Nichols v. Dusenbury*, 2 N. Y. 283.

<sup>5</sup> *Wilson v. Smith*, 5 Yerg. 379; *Bartlett v. Farrington*, 120 Mass. 284; *Fuller v. Ruby*, 10 Gray, 385; *Cushing v. Adams*, 18 Pick. 110; *Walker v. Shoemaker*, 4 Hun, 579.

As, where a landlord, owning a lot adjoining the demised premises, built a house on the lot so as to cut off the tenant's light and air, or inadvertently put up a division fence on tenant's land, or where he continued the possession of a small portion of the demised premises, for a brief period after the expiration of the time fixed by the lease for his giving possession, without any intention to keep the tenant out of it, his act was in neither case held to amount to an eviction, nor did it exonerate the tenant from the payment of rent.<sup>1</sup> But where a party, after executing leases of portions of his farm to several tenants, granted the whole farm, with the reversion of the demised premises, to a tenant in fee, reserving an annual rent, and after such grant entered upon the premises, and distrained the goods of the original tenants, for rent accrued subsequent to the grant of the whole estate,—the entry and distress were held equivalent to an eviction of the principal tenant, and produced a suspension of the rent.<sup>2</sup> And if a landlord takes possession of the ruins of his premises damaged by fire, for the purpose of rebuilding, without the consent of his tenant, it is an eviction; if with his assent it is a rescission of the lease, and in either case the rent is suspended.<sup>3</sup> But where a landlord does acts merely tending to diminish the beneficial enjoyment of the premises, and the

<sup>1</sup> *Palmer v. Wetmore*, 2 Sandf. 316; *Myers v. Gemmel*, 10 Barb. 537; *Hazlett v. Powell*, 30 Pa. St. 293; *Vanderpool v. Smith*, 1 Daly, 311; *Mirick v. Hoppin*, 118 Mass. 582. And where, after the tenant abandoned, the landlord entered to put up a notice "to let," or advertised to let, it was no eviction. *Pier v. Carr*, 69 Pa. St. 326; *Oastler v. Henderson*, 2 L. R. Q. B. Div. 575. That an adjoining owner undermines the tenant's wall is no excuse for the non-payment of rent. *Kramer v. Cook*, 7 Gray, 550.

<sup>2</sup> *Lewis v. Payn*, 4 Wend. 423.

<sup>3</sup> *Magaw v. Lambert*, 3 Pa. St. 444. So repairs that are not ordinary, but of a character to deprive the tenant of all beneficial use, or at least seriously interrupt it for a considerable time, amount to an eviction. *Hoeveler v. Fleming*, 91 Pa. St. 322. But if repairs are made by agreement, and a specified reduction of rent is provided for to compensate the tenant for the inconvenience, the tenant cannot set up the fact that the repairs have occupied a longer time than was anticipated, in defence to an action for the rent. *Reineman v. Blair*, 96 *id.* 155. See *Maberry v. Dudley*, 2 Penny. (Pa.) 867; *McMann v. Autenreith*, 17 Hun, 163.

tenant continues to occupy them,<sup>1</sup> or where the landlord deprives the tenant of something out of which no rent issues, the obligation to pay rent continues.<sup>2</sup>

§ 381. **Acts to produce Eviction. — Intent essential.** — In order, however, to produce an eviction, it is not necessary that there should be an actual physical expulsion, for the landlord may do many acts tending to diminish the enjoyment of the premises, besides effecting an actual expulsion, which will amount to an eviction in law, and exonerate the tenant, if he quits possession, from the payment of rent.<sup>3</sup> For, as we have said, a tenant is required to pay rent only for the beneficial enjoyment of the premises, unmolested in any way by the landlord; if, therefore, the landlord should erect a nuisance or a permanent structure so near the demised premises as to deprive the tenant of the use of them, or of any considerable portion thereof, it would in either case be equivalent to an eviction, and justify the tenant in quitting possession.<sup>4</sup> And where the lessor was guilty of habitually bringing lewd women under the same roof with

<sup>1</sup> *Edgerton v. Page*, 20 N. Y. 281; *Boreel v. Lawton*, 90 N. Y. 293; *Acad. of Mus. v. Hackett*, 2 Hilt. 217; *Mortimer v. Brunner*, 6 Bosw. 653. A mere trespass by the landlord, — as where he piled firewood on part of the leased land, — and which did not interfere with the substantial enjoyment of the premises, does not amount to an eviction, nor release the tenant from the payment of rent. The lessee's remedy is by an action against the lessor for the injury, if any, which he has sustained. *Lounsbury v. Snyder*, 31 N. Y. 514.

<sup>2</sup> *Sanderson v. Harrison*, Cro. Jac. 679; *Watts v. Coffin*, 11 Johns. 495; *Williams v. Hayward*, 1 Ellis & E. 1040; *Lynch v. Baldwin*, 69 Ill. 210. So where lessor failed to repair water-pipes or lowered the grade of the street outside the demised premises. *Coddington v. Dunham*, 35 N. Y. 412; *Gallup v. Alb. R. R.*, 7 Lans. 471.

<sup>3</sup> Thus, evidence that the tenant was enjoined from using the demised premises by an *ex parte* injunction issued at the landlord's instance is admissible under a plea of eviction in an action for the rent. *Pfund v. Herlinger*, 10 Phila. 13.

<sup>4</sup> *Royce v. Guggenheim*, 106 Mass. 201; *Skally v. Shute*, 132 Mass. 367. But a breach of the lessor's covenant not to rent other property in the same neighborhood for the same business as that of the lessee is not an eviction. *Allegaert v. Smart*, 2 Penny. (Pa.) 320.

the demised premises, though in an apartment not demised, by which nocturnal noise and disturbance was made, and in consequence the lessee quitted the premises with his family, it was held to amount to an eviction, and no rent was recoverable.<sup>1</sup> But no wrongful act of the landlord will suspend or extinguish the rent, if the tenant continues to occupy the premises during the time such rent accrued.<sup>2</sup> The intent of the landlord to evict must always appear in

<sup>1</sup> *Pendleton v. Dyett*, 4 Cow. 581; s. c. 8 *id.* 727. In *Cohen v. Dupont*, 1 Sand. 260, this case was followed, and any intentional disturbance to tenant's beneficial occupancy authorized the latter to quit. But it is an indispensable requisite that the tenant should quit. *Cram v. Dresser*, 2 *id.* 120. So where the lease reserved three rooms which the lessor occupied, and the lessee was compelled to remove by reason of gaming, unseemly sports, uncouth noises, profane and obscene expressions, proceeding from the lessor's portion of the house, this was held a constructive eviction. *Rowbotham v. Pearce*, 5 Houst. 135. See next notes.

<sup>2</sup> *Egerton v. Page*, *supra*. The distinction taken here and in the preceding section is, that if there is a physical ouster of however small a part of the premises demised, the tenant need pay no rent for the part retained by him, and need not abandon it in order to complete the eviction. See cases cited *ante*, § 378, and notes. But if there are only acts of trespass on the part of the landlord, or which merely diminish the beneficial occupation of the lessee, he must abandon the premises or be still bound for the rent. See cases cited in the preceding note, also *Elliott v. Aiken*, 45 N. H. 35; *Gilhooley v. Washington*, 4 N. Y. 217; *Wilson v. Smith*, 5 Yerg. 379; *Rogers v. Ostrom*, 35 Barb. 523; *DeWitt v. Pierson*, 112 Mass. 8; *Newby v. Sharpe*, 8 Ch. D. 39. Thus a refusal by lessor to permit sub-lessee to occupy: *Randall v. Alburdis*, 1 Hill, 28; or his notice to under-tenant to quit, on which the latter acts: *Burns v. Phelps*, 1 Stark. 94; *Levitzky v. Canning*, 33 Cal. 299; or refusal to give lessee a lease, &c.: *Greton v. Smith*, 33 N. Y. 245; or, where the lease was of a distillery, his refusal to give lessee the certificate required by the U. S. law, in order to enable him to commence business: *Grabenhorst v. Nicodemus*, 42 Md. 236; or where an adjoining cellar owned by landlord was so offensive as to be a nuisance: *Alger v. Kennedy*, 49 Vt. 109; and see *Scott v. Simons*, 54 N. H. 426; *Hilliard v. Gas Coal Co.*, 41 Ohio St. 662. So *Boston & W. R. R. v. Ripley*, 13 Allen, 421; *Jackson v. Eddy*, 12 Mo. 209; *Peck v. Hiler*, 24 Barb. 178; *Lawrence v. French*, 25 Wend. 443. In *Halligan v. Wade*, 21 Ill. 470, the above distinction does not seem to be regarded, and injuries to tenant's beneficial occupation were held a defence to rent, though the lessee remained in occupation. But in *Leadbeater v. Roth*, 25 *id.* 587, this case is stated in conformity with the general rule given.

this kind of eviction, and this is a question for the jury.<sup>1</sup> And the act complained of must proceed from the landlord, for where a tenant abandons the premises, and resists the payment of rent subsequently accruing, on the ground that other apartments in the same building, adjoining or below his, are occupied as a place of prostitution, he must show that the landlord created the nuisance, by leasing the apartments for that purpose, or that it existed by his connivance and consent.<sup>2</sup>

§ 382. **No implied Warranty as to Condition of Leased Property.** — There is no implied warranty on the letting of a house, that it is safe, well-built, or reasonably fit for habitation; or of land that it is suitable for cultivation, or for any other purpose for which it was let.<sup>3</sup> And where a person

<sup>1</sup> *Upton v. Townend*, 17 C. B. 30; per Jervis, C. J., and Williams, J.; *Henderson v. Mears*, 1 Fost. & F. 636.

<sup>2</sup> *DeWitt v. Pierson*, *supra*; *Gilhooley v. Washington*, 4 N. Y. 217. In this latter case it was held that if a landlord lets part of a house to one tenant, and another part to another, and one of them makes his part a nuisance, so as to render the other part no longer habitable, the lease to the other is not thereby determined, nor is he excused from the payment of rent; for that the doctrine of eviction by nuisance is not applicable in any case where the landlord is not instrumental in producing the nuisance; nor is the landlord under any obligation to institute proceedings against the disorderly tenant for a misdemeanor under 2 R. S. 702, § 29. To constitute an eviction, without physical ouster, the tenant must have abandoned the premises in consequence of acts of his landlord so illegal and monstrous as to be equivalent to an absolute physical ouster. *DeWitt v. Pierson*, *supra*. See *Mortimer v. Brunner*, 6 Bosw. 653; *Ogilvie v. Hull*, 5 Hill, 52. And in *Townsend v. Gilsey*, 1 Sweeny, 155, a landlord was held not responsible, unless he knew at the time of demise that the place was to be used for prostitution. Annoyance to the tenant of a house which had been used as a brothel before he lived in it, by lewd persons constantly calling for admittance, so that he was obliged to remove his family therefrom, does not constitute an eviction. Nor was the landlord bound to disclose to a lessee the purposes to which the demised premises had been previously put, nor can he be held liable for the conduct of strangers, especially when relief may be had on application to the police. *Meeks v. Bowerman*, 1 Daly, 99.

<sup>3</sup> *Westlake v. Degraw*, 25 Wend. 669; *O'Brien v. Capwell*, 59 Barb. 477; *Graves v. Cameron*, 58 How. Pr. 75; *Welles v. Castles*, 3 Gray, 323; *Libbey v. Tolford*, 48 Me. 316; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v.*

hired a house and garden for a term of years, to be used for a dwelling-house, but subsequently abandoned it as unfit for habitation, in consequence of its being infested with vermin and other nuisances, which he was not aware of when he took the lease, the principle was laid down, after an elaborate review of all the cases where a contrary doctrine seemed to have prevailed, that there is no implied contract on a demise of real estate that it shall be fit for the purposes for which it was let. Consequently an abandonment of the premises under these circumstances forms no defence to an action for rent.<sup>1</sup> And, in all cases where a tenant has been allowed upon suggestions of this kind to withdraw from the tenancy, and refuse the payment of rent, there will be found to have been a fraudulent misrepresentation or concealment, as to the state of the premises which were the subject of the letting; or else the premises proved to be uninhabitable by some wrongful act or default of the landlord himself. The lessor is not, however, always bound to disclose the state of the premises to the intended lessee, unless he knows that the house is really unfit for habitation, and that the lessee

Peyser, *id.* 242; Rutland Found. & Mach. Shop Co. v. King, 51 Vt. 462; Coe v. Vogdes, 71 Pa. St. 383; Smith v. Kinkaid, 1 Bradw. (Ill.) 620; Hart v. Windsor, 12 M. & W. 68; Sutton v. Temple, *id.* 52; directly overruling the cases of Edwards v. Etherington, 2 Ry. & M. 268; Manchester Bond. Warehouse Co. v. Carr, 5 C. P. D. 507; Collins v. Barrow, 1 Mo. & R. 112; and Salisbury v. Marshall, 4 C. & P. 65. There is no such implication, on a letting of land for agricultural purposes, as that no noxious plants, or the like, are growing on the demised premises: Erskine v. Adeane, L. R. 8 Ch. 756; or as to a building that it shall continue fit for the purposes for which it was let: Robins v. Mount, 4 Rob. (N. Y.) 553; Acad. of Mus. v. Hackett, 2 Hilt. 4. In the absence of any stipulation on the subject, a person who agrees to take a house, must take it as it stands, and cannot call upon the landlord to put it into a condition which will make it better fitted to live in. Chappell v. Gregory, 34 Beav. 250. A warranty that a house is habitable is not a warranty that it will continue so. Fowler v. Stevens, 49 N. Y. S. C. 479. Where a landlord covenanted to make certain repairs, and at time of making these orally agreed to make certain other repairs, which oral agreement he did not fulfil, it was held that the tenant could not maintain an action for injuries received by reason of such failure. Kabus v. Frost, 50 N. Y. S. C. 72.

<sup>1</sup> Cleves v. Willoughby, 7 Hill, 83. The doctrine of implied warranties relates to the title, and not to the quality of the premises. *Id.*



does not know it, and is influenced by his belief of the soundness of the house in agreeing to take it; for the conduct of the lessor may in this respect amount to a deceit practised upon the lessee.<sup>1</sup>

<sup>1</sup> Per Tindal, C. J., in *Izon v. Gorton*, 5 Bing. (N. C.) 501. A tenant who was induced to accept a lease by false representations continued to occupy the premises, and paid rent for nine months; held, that both he and his surety were thereby precluded from raising the objection of fraud. *Rosenbaum v. Gunter*, 3 E. D. Smith, 203. So where the landlord fraudulently concealed the bad reputation of the premises as a house of prostitution, and the tenant remained in possession without repudiating the contract. *Carhart v. Ryder*, 11 Daly, 101. The point of conflict in the authorities has been to determine when the failure by the landlord to disclose a defect is concealment or active deceit. Of course, where he directly leads by words or conduct to a false impression as to the existence of a nuisance, he is liable therefor. *Staples v. Anderson*, 3 Rob. (N. Y.) 327. The difficulty arises where he says nothing. In *Keates v. Cadogan*, 10 C. B. 591, following *Cornfoot v. Fowke*, 6 M. & W. 308, the failure to disclose that the premises were ruinous was held no defence to rent. The rule of *caveat emptor* stated in *Hart v. Windsor*, 12 M. & W. 68, was here applied, and the tenant held to take the risk of all that he could have ascertained by examination or inquiry; and the same rule was laid down in *Westlake v. Degraw*, *supra*; *Christopher v. Austin*, 11 N. Y. 216; and in *Sutphen v. Sebass*, 14 Abb. N. C. 67. n., and *Coulson v. Whiting*, *id.* 60, it was held that, in general, a landlord is not bound to disclose defects in the structure or condition of the premises, — such as a defect in the plumbing. — that make them unfit for habitation. There is no presumption of law that a landlord knows the defective condition of his houses. *Jackson v. Odell*, 9 Daly, 371. And in *Coulson v. Whiting*, *supra*, it was held that unless circumstances show a different understanding, a statement by the landlord that the house is in good order is to be taken merely as an expression of opinion, and not as the assertion of a fact. In *McGlashan v. Talmage*, 37 Barb. 313, the rule was carried so far as to include a stench injurious to health. But in *Wallace v. Lent*, 1 Daly, 481, while the general rule is admitted that there is no warranty that the premises are fit for habitation, yet if they are subject to a nuisance prejudicial to life or health, it is held to be the landlord's duty to inform the tenant of it, because it is assumed that the tenant takes them as healthy; and in the quite recent cases of *Minor v. Sharon*, 112 Mass. 477, and *Cesar v. Kountz*, 60 N. Y. 229, letting premises known to be infected with small-pox was held actionable. So when the lessor fraudulently concealed the dangerous condition of the drains on the premises. *Crump v. Morell*, 12 Phila. 249. In *Hazlett v. Powell*, 30 Pa. St. 293, the general rule was affirmed, but there was there no nuisance.

In Michigan it is held, when premises are rented with the distinctly

§ 383. **Exception in Contracts of a Mixed Nature.** — But an exception holds, when the contract is of a mixed nature, as for lodging, or of a house with furniture; where it was said the landlord does impliedly contract that it shall be reasonably fit for habitation, and that the tenant may quit without notice, if it be not so. Thus, where a man took a ready-furnished house, but upon entering found it so infested with vermin as to be unfit for the occupation of a respectable family, Lord Abinger, C. B., held that the house being let with the furniture, for occupation, for a limited period, there was an implied condition that it should be habitable when the defendant entered upon the possession; and he therefore left it for the jury to say whether, under all the circumstances of the case, the alleged grievance amounted to a nuisance, or was merely made a pretext by the tenant for leaving the house.<sup>1</sup> But when, from the terms of the lease, it appears that the property rented was to be fitted up as a store, it will be understood that the store shall be fit for such use at the time of the commencement of the term.<sup>2</sup> And where a fur-

implied understanding that they are in good condition, as where the lessee covenants that he so receives them, that such understanding becomes part of the consideration, and that if the consideration fails the lessee is justified in abandoning and refusing to pay rent. *Tyler v. Disbrow*, 40 Mich. 415, per Campbell, C. J.

Where the lessor of a coal-mine that could not be examined, by wilfully false representations induced the lessee to accept a lease which was of less value than if the representations had been true, it was held that the lessor was answerable in damages to the lessee. *Arbuckle v. Biederman*, 94 Ind. 168.

<sup>1</sup> *Smith v. Marrable*, 11 M. & W. 5. See also *Cowie v. Goodwin*, 9 C. & P. 378; *Potter v. Truitt*, 3 Harringt. 331. The case of *Smith v. Marrable* has been repeatedly questioned, — see *Howard v. Doolittle*, 3 Duer, 464, and cases *ante*, § 382, n. 1, — and only sustained on the ground that the demise was of a furnished house. *Dutton v. Gerrish*, 9 Cush. 89; *Naumberg v. Young*, 15 Vroom, 332, where the contrary rule was applied in the case of a lease of a factory and machinery therein. It has, however, been followed in *Wilson v. Finch*, Hatton, 2 L. R. Exch. Div. 836. But in that case not only were the premises a furnished house, but there was an apparent affirmative answer to the tenant's inquiry if the drains upon the premises were in good order.

<sup>2</sup> *La Farge v. Mansfield*, 31 Barb. 345. A lease of a coal mine is no warranty that the land contains coal. *Harlan v. Lehigh Co.*, 35 Pa. St.

nished house was let at a certain rent payable in advance from a certain future day, with an agreement that it should be furnished suitably for a school, it was held that the suitable furnishing of the house was a condition precedent to the right to demand rent.<sup>1</sup>

§ 384. **Rent not recoverable when Consideration fails.**—Rent being an equivalent for an interest enjoyed, a covenant for its payment cannot be enforced if no estate passed under the lease, and the tenant has not occupied the premises; since there is no legal consideration for the engagement. As, if an attorney grants a lease for another in his own name, instead of the name of his principal;<sup>2</sup> or if the committee of a lunatic, having no legal authority for that purpose, make leases in their own name;<sup>3</sup> or whenever the lessor (supposing him competent to demise) has no interest in the premises,<sup>4</sup> or where the contract of demise is avoided for lessor's fraud.<sup>5</sup> The same result ensues, whether the lease is void at common

287. So where the lease was of surplus water-power, the lessor was not bound to keep the canal in order: *Trustees v. Brett*, 25 Ind. 409; *Morse v. Maddox*, 17 Mo. 569; *Ballard v. Butler*, 30 Me. 94; but where the lessor was to furnish steam-power, here, as an overt act was contemplated on the part of the lessor, on his default his lessee may abandon or recoup: *Crane v. Hardman*, 4 E. D. Smith, 339; *Fisher v. Barrett*, 4 Cush. 381. The rule stated in the text that there is no implied warranty of fitness in a lease, is entirely reversed in Louisiana, where it is held that a lessor is bound to indemnify the lessee against all the vices and defects of the leased premises, though he knew nothing of them at the time of making the lease, and even where they have arisen since. *Perrett v. Dupré*, 3 Rob. (La.) 52.

<sup>1</sup> *Mechelen v. Wallace*, 7 Ad. & E. 54, n.

<sup>2</sup> *Frontin v. Small*, 2 Ld. Ray. 1418; *May v. Trye*, Freem. 447; *ante*, § 139.

<sup>3</sup> *Knipe v. Palmer*, 2 Wils. 130.

<sup>4</sup> *Aylet v. Williams*, 3 Lev. 193; *Field v. Herrick*, 14 Bradw. (Ill.) 181, where the lessee at the beginning of the term found another in possession, rightful as between him and the lessor.

<sup>5</sup> *Milliken v. Thorndike*, 103 Mass. 382. So where the lease is rescinded by lessor, and the rent has been paid in advance, the lessee may recover any excess over the value for the time he occupied. *Smith v. Newcastle*, 48 N. H. 70. And though a rescission is claimed, rent already accrued is not affected. *Learned v. Ryder*, 61 Barb. 552.

law or has been annulled by statute.<sup>1</sup> And where a license was granted for a term of years to continue a channel opened through the bank of a navigable canal, in order that the waste water might pass through the channel to the mills of the grantee, on his covenanting to pay a certain annual sum, but it appeared on the trial that the grantors had no legal or equitable estate in the premises professed to be granted, the court held that the grantee or his assignee was not bound by the covenant.<sup>2</sup> And although a man cannot execute a valid lease of land which strictly he does not own, or of buildings not yet erected, if he agrees with another to purchase land and erect a building and give him a lease thereof, and the other treats the building as completed and enters into possession under a contract, he becomes bound to pay rent, according to the terms of the agreement, although the building may not be completely finished.<sup>3</sup>

§ 385. **Apportionment of Rent. — When by Act of Parties Lessee's Consent essential.** — The tenant's obligation to pay rent may also be apportioned; for, as rent is incident to the reversion, whenever that is severed, either by the act of the parties, as where the lessor grants part of it to a stranger, or by act of law, when it descends to his heirs, the rent following the reversion will be apportioned, and become payable to the assignees of the respective portions thereof.<sup>4</sup> But the lessee's consent to the apportionment, when made by the lessor alone, is necessary to give it validity; unless the proportion of rent chargeable upon each part of the land has been agreed upon between the lessor and his assignee, or, in case of dispute, has been settled by the intervention of a jury.<sup>5</sup> Such an apportionment is to be made among the several owners of the reversion, or of the rent, according to the value

<sup>1</sup> *Cleves v. Willoughby*, 7 Hill, 83; *Jevens v. Harridge*, 1 Saund. 6; s. c. 2 Keb. 102, 116.

<sup>2</sup> *Portmore v. Bunn*, 1 B. & C. 694.      <sup>3</sup> *Haven v. Wakefield*, 39 Ill. 509.

<sup>4</sup> *Daniels v. Richardson*, 22 Pick. 569; *Crosby v. Loop*, 13 Ill. 625, 627; *Green v. Massie*, *id.* 625; *Worthington v. Cooke*, 56 Md. 51; *Ehrman v. Mayer*, 57 *id.* 612; Co. Lit. 148, a.

<sup>5</sup> *Bliss v. Collins*, 5 B. & A. 876; *Roberts v. Snell*, 1 Mann. & G. 577; *Ryerson v. Quackenbush*, 2 Dutch. 236; *Farley v. Craig*, 6 Halst. 262.

of the several parts held by each, and not according to the quantity, or number of acres;<sup>1</sup> and it is the province of a jury to apportion the rent to the value, according to the evidence produced, unless the parties themselves settle the proportions which are to be collected from each tenant.<sup>2</sup> But where there is no proof of value, the apportionment will be made according to the quantities.<sup>3</sup> And where the lessor is entitled only to a proportional part of the rent, an action for its recovery need not be confined to that part, but he may sue for the whole amount, and recover as much as, in the opinion of the jury, he ought to have, and will be barred as to the residue.<sup>4</sup> An apportionment of rent follows only upon an alienation of the reversion in parcels by the lessor; for a tenant cannot, by an assignment of the term, relieve himself of any portion of his liability on his contract.<sup>5</sup> He may transfer his privity of estate to the extent of the parcel assigned, but as the assignee succeeds to his liability, the lessor will have a double remedy,—against the lessee on his privity of contract, and the assignee on account of the privity of estate.<sup>6</sup> Nor can one of two joint tenants of a lease discharge or apportion his liability by assigning over to the other; for the lessees, by their own act, cannot divide the rent so as to put the lessor to several remedies for it.<sup>7</sup>

<sup>1</sup> *Van Rensselaer v. Gallup*, 5 Den. 454; *Same v. Bradley*, 3 *id.* 135; *Reed v. Ward*, 22 Pa. St. 144; *Biddle v. Husman*, 23 Mo. 597.

<sup>2</sup> 3 Kent, Com. 470; *Cuthbert v. Kuhn*, 3 Whart. 357; *Farley v. Craig*, 6 Halst. 262; *McElderry v. Flannagan*, 1 Har. & G. 308.

<sup>3</sup> *Van Rensselaer v. Jones*, 2 Barb. 643; *Linton v. Hart*, 25 Pa. St. 193.

<sup>4</sup> *Walter v. Maunde*, 1 Jac. & W. 181; *Worthington v. Cooke*, *supra*. Where land in possession of a tenant for years is conveyed by deed, the right of a purchaser of the reversion to receive the whole rent of the current quarter cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between assignor and assignee. *Flinn v. Calow*, 1 Mann. & G. 589. If one of two tenants in common, who are lessors, gives notice to the lessee not to pay his portion of the rent to the other, he may recover his share from the tenant, in case he pays the whole to the other; *Harrison v. Barnsby*, 5 T. R. 246.

<sup>5</sup> *Rushden's Case*, Dyer, 4, b; *Broom v. Hore*, Cro. El. 633.

<sup>6</sup> *Stevenson v. Lambard*, 2 East, 575. See *Mayor, &c. v. Thomas*, 10 Q. B. D. 48.

<sup>7</sup> *Bailiff of Ipswich v. Martin*, 1 Roll. Abr. 235, l. 35. Where several persons being the owners of land chargeable with rent, as tenants in com-

§ 386. **Apportionment by Act of Law. — Lessee's Consent not Essential.** — But whenever a reversion is severed by act of law, there will be an apportionment of rent without the consent of tenants. Thus, upon a descent of the reversion among heirs, or on a judicial sale of part of the demised premises, the tenant will have two landlords, and be bound to pay rent to each, for the portion of the premises belonging to them respectively.<sup>1</sup> Or if a landlord dies leaving a widow, she will have a right to receive one third of the rent, while the remaining two thirds will be payable to his heirs.<sup>2</sup> So the appropriation of a portion of the premises to public uses, as by opening a street, extinguishes a ratable proportion of the rent; and if necessary the amount due for the residue of the estate may be ascertained by a proceeding in equity.<sup>3</sup> So if a tenant purchases the reversion of a part of the demised premises at a sale on execution against his landlord, he is also entitled to apportionment.<sup>4</sup> And if he assigns part of his interest to another, the lessor may, as we have already intimated, maintain an action against the assignee for his proportion of the rent.<sup>5</sup>

mon, make a voluntary partition among themselves, each assuming the payment of his equitable share of the rent, a release to one of the owners will not extinguish the liability of another, and the land of each still remains chargeable with the rent; but, as between themselves, each is liable to the other for any amount he may be compelled to pay beyond his proportionate share. *Van Rensselaer v. Chadwick*, 24 Barb. 333. And if a portion of the land so partitioned comes to the possession of a third person, he is also liable as assignee of the lessee. *Van Rensselaer v. Gifford*, *id.* 349. An assignee is liable to pay the whole rent when it becomes due, and cannot collect a portion of it from his assignor, the lessee; for, in the absence of a special agreement, the rent cannot be apportioned between them. *Graves v. Porter*, 11 Barb. 592.

<sup>1</sup> *Cole v. Patterson*, 25 Wend. 456; *Co. Lit.* 148, a; *Wotton v. Shirt*, *Cro. El.* 742; *Crosby v. Loop*, 18 Ill. 625; *Buffum v. Deane*, 4 Gray, 385.

<sup>2</sup> 1 Roll. Abr. 237, b, 12, Apportionment; *Ewer v. Moyle*, *Cro. El.* 771.

<sup>3</sup> *Gillespie v. Thomas*, 15 Wend. 46; *Wiggin v. N. York*, 9 Paige, 16; *David v. Beekman*, 5 La. Ann. 545; *Kingsland v. Clark*, 20 Mo. 24; *Sch. & Del. Co. v. Schmoele*, 57 Pa. St. 271.

<sup>4</sup> *Nellis v. Lathrop*, 22 Wend. 121.

<sup>5</sup> *Van Rensselaer v. Bradley*, 3 Den. 135. Rent payable in fowls and service, with carriage and horses, is in its nature divisible and apportionable. *Van Rensselaer v. Clifford*, 24 Barb. 349.

§ 387. **Examples of Apportionment by Act of Law.** — Various other instances of apportionment by act of law, may be mentioned. Thus, if a landlord enters upon part of the land for a forfeiture, he is only entitled to the proportion of rent due for the other part.<sup>1</sup> Or if the tenant surrenders part of his estate to the lessor, retaining the other part, the rent will be apportioned, and payable only in respect to the residue of the premises.<sup>2</sup> And if he be evicted from part by force of a paramount title, there will be no suspension of the whole rent, but it will be apportioned, and is payable only for the residue.<sup>3</sup> As between the lessor and an assignee of the lessee, where the lessor's right to rent depends solely upon the privity of estate, an eviction out of part will not suspend the rent *in toto*, but the assignee will continue liable for rent payable in respect to the residue of the lands demised.<sup>4</sup>

§ 388. **Eviction suspends Rent thereafter Accruing.** — Where the lessee has been once evicted, the rent will be suspended for the future, although the obstacle to his re-entry may have been removed. As, where a defendant pleaded that the lessor entered *and held him out*, it was determined that the entry of the lessor was enough to satisfy the averment of holding out, and that it suspended the rent, although it appeared that the lessor retired from the land immediately after the lessee's eviction.<sup>5</sup> So in a case where a lessee took possession of a

<sup>1</sup> Walker's Case, 3 Co. 22. But if he enters wrongfully upon part of the land and evicts the tenant, the rent is suspended for the whole and no apportionment will be made. *Id.*

<sup>2</sup> Smith v. Malines, Cro. Jac. 160.

<sup>3</sup> *Id.*; Co. Lit. 148; Walker's Case, *supra*.

<sup>4</sup> Stevenson v. Lambard, 2 East, 575. See Mayor &c. v. Thomas, 10 Q. B. D. 48.

<sup>5</sup> Cibel v. Hill, 1 Leon. 110. Under a covenant in a lease that if the landlord re-enter for non-payment of rent, he might relet the premises as the tenant's agent, and that the tenant should be liable for any deficiency, if the landlord re-enters and relets, and brings an action for the deficiency before the rent under the new lease becomes due, he can only recover the difference between the rent reserved by the original lease and the rent agreed to be paid by the tenant. By commencing the action before waiting to see if the new tenant pays the rent he agrees to pay, he assumes the hazard of his default. In such an action, the landlord cannot



farm, under an agreement which his landlord in a material point failed to fulfil, and occupied the premises for a year; at the expiration of which time the landlord sued him for the full amount of the rent, — the court were of opinion that the agreement between them was only evidence of the amount of rent to be paid, where the tenant had occupied under such an agreement; but that, in the present instance, the landlord having failed to fulfil the agreement, in the chief object which had induced the lessee to propose becoming a party to it, the tenant could not be said to hold the farm under the agreement; and that, therefore, the landlord was not entitled to recover the full amount of rent, but only so much as the jury should think the tenant ought to pay, under all the circumstances of the case.<sup>1</sup> Where part of the land is lost to a tenant by the act of God, he is not liable for the whole rent, — as, if the sea break in and overflow a part of the land; in which case, although the soil remains to the tenant, he cannot appropriate the fishery, which is its only use, to his exclusive enjoyment, — the sea, the common highway of nations, being open to every one. But a distinction is made between the sea and fresh water, because though the land be covered with fresh water, the right of taking fish there is exclusively vested in the lessee, and therefore there will be no deduction of rent in this event.<sup>2</sup>

§ 389. **No Apportionment in respect of Time. — Statutory Exception.** — It is also well settled that in all cases of periodical payments, accruing at intervals, and not *de die in diem*, there can be no apportionment, for rent will not be apportioned in respect to time unless by force of a statute, or of some special provision of the lease.<sup>3</sup> If, therefore, a tenant is evicted at any time before rent becomes due, it is not payable at all. If there be a lease for a term of years, with recover for the expenditures made by him upon the premises after the re-entry, although by reason thereof he was enabled to relet at an enhanced rent. *Hackett v. Richards*, 13 N. Y. 138.

<sup>1</sup> *Tomlinson v. Day*, 2 Br. & B. 681.

<sup>2</sup> 1 Roll. Abr. 236, l. 46; *Richard le Taverner's Case*, Dyer, 56, a.

<sup>3</sup> *Clapp v. Astor*, 2 Edw. Ch. 379; *Mayor v. Ketchum*, 67 How. Pr. 161; *Wilson v. Harman*, 2 Ves. Sr. 672.

rent payable annually, and before the expiration of the year the lessee be evicted, the lessor can have no rent;<sup>1</sup> or, if the rent is payable quarterly, and the tenant be turned out before the end of a quarter, the landlord loses the rent of the current quarter.<sup>2</sup> And a similar result follows upon a voluntary surrender of the term by the lessee or his assignee to the landlord, before the rent of the current quarter becomes payable.<sup>3</sup> For this reason, at common law, if a tenant for life made a lease for years, rendering a yearly rent, and died in the course of the year, the rent was lost to both executor and remainder-man, and was recoverable neither at law nor in equity; it did not accrue in the time of the remainder-man, and the tenant's estate was absolutely determined by the lessor's death, so that there was nothing which could be apportioned.<sup>4</sup> But the statute of 11 Geo. II. c. 19, supplemented by subsequent enactments, first applied a remedy to cases of this kind.<sup>5</sup> This statute, however, applies only

<sup>1</sup> *Bank of Penn. v. Wise*, 3 Watts, 394; *Plymouth v. Throgmorton*, 1 Salk. 65.

<sup>2</sup> *Zule v. Zule*, 24 Wend. 76; *Clun's Case*, 10 Co. 128; *Wood v. Partridge*, 11 Mass. 488. If rent be payable quarterly, nothing is due until the time stipulated for payment arrives. *Fitchb. Man. Co. v. Melven*, 15 *id.* 268. So where the lease was terminated between rent-days in pursuance of a power reserved in the lease so to do. *Nicholson v. Munigle*, 6 Allen, 215; *Fuller v. Swett*, 6 *id.* 219, n. A tenant at will is not liable for use and occupation from the preceding rent-day to the eviction, nor as a tenant at sufferance, because he is a tenant at will. *Emmes v. Feeley*, 132 Mass. 346. See *Robinson v. Deering*, 56 Me. 357; *Cameron v. Little*, 62 *id.* 550.

<sup>3</sup> *Young v. Peyser*, 3 Bosw. 308; *Curtis v. Miller*, 17 Barb. 477.

<sup>4</sup> *Clun's Case*, *supra*; *Jenner v. Morgan*, 1 P. Wms. 892; *Cutter v. Powell*, 6 T. R. 320; *Perry v. Aldrich*, 18 N. H. 343.

<sup>5</sup> The Revised Statutes of New York, following the English statutes, declare: "When a tenant for life, who shall have demised any lands, shall die on or after the day when any rent became due and payable, his executors or administrators may recover from the under-tenant the whole rent due; if he die before the day when any rent is to become due, they may recover the proportion of rent which accrued before his death." 1 R. S. 747, § 22. The provisions of this statute extend only to the case of a demise by a tenant for life. *Rapalye v. Rapalye*, 27 Barb. 610. A similar statute exists in other States. In *Borie v. Crissman*, 82 Pa. St. 125, it was held to apply to rent in kind.

to leases made by the tenant for life, and not to those made by the testator; and therefore a devisee for life of the income of real estate leased for a term of years, is entitled only to the rents falling due in his lifetime; and if he dies between two quarter-days, the rent cannot be apportioned, but goes to the remainder-man.<sup>1</sup>

§ 390. **To whom Rent may be Payable.** — With respect to the person to whom rent is payable, it is scarcely necessary to observe that every tenant is responsible to his immediate landlord, in the first instance; but an under-tenant, in order to protect his possession, may always pay rent to the original lessor. And it is not necessary for his protection that the lessor should threaten a suit, or even demand the money; the right of the landlord to re-enter is sufficient to render the payment compulsory.<sup>2</sup> If the lessor dies after rent has become due, it is payable to his executor or administrator, and not to the heir-at-law; but the rent which accrues after the death of the lessor belongs to the heir, and not to the executor or administrator.<sup>3</sup> An illustration of this principle occurs in a case where a tenant for life, having granted leases in conformity to his power, died before midnight, though after sunset on the rent-day; the remainder-man was declared to be entitled to the rent, because it followed the reversion, which descended to the heir-at-law before the rent became due.<sup>4</sup>

<sup>1</sup> *Stillwell v. Doughty*, 3 Bradf. 359; *Marshall v. Moseley*, 21 N. Y. 280; *Sohier v. Eldredge*, 103 Mass. 345. But an heir would take the whole quarter's rent as incident to the reversion. *Fay v. Halloran*, 35 Barb. 295; *Lowe v. Felch*, 3 Bosw. 63.

<sup>2</sup> *Peck v. Ingersoll*, 7 N. Y. 528; see *ante*, § 155; *Collins v. Whilldin*, 3 Phila. 102. As regards rent in case of a mortgage by the lessor, see *ante*, § 121 *et seq.*

<sup>3</sup> *Cole v. Patterson*, 25 Wend. 456; *Duppa v. Mayo*, 1 Saund. 287; *Barwick v. Foster*, Cro. Jac. 227; *O'Bannon v. Roberts*, 2 Dana, 54; *Dixon v. Nicolls*, 39 Ill. 372. So if an administrator collects rent, he holds it in trust for the heirs. *Robb's Appeal*, 41 Pa. St. 45; *King v. Anderson*, 20 Ind. 385; *McDowell v. Hendrix*, 67 Ind. 513; *Mills v. Merryman*, 49 Me. 65; *Rowan v. Riley*, 6 Baxt. 67. So where rent is payable in kind. *Cobel v. Cobel*, 8 Pa. St. 342; *Burns v. Cooper*, 31 *id.* 428.

<sup>4</sup> *Norris v. Harrison*, 2 Madd. 268. But where rent was payable in

§ 391. **When Rent becomes Due and Payable.** — As to the time when rent becomes due, we observe that, by the old law, it was due and payable before sunset of the day whereon it was to be paid, — on the ground that sufficient light should remain to enable the parties to reckon the money; for anciently the day was accounted to begin only from sunrise, and to end immediately after sunset.<sup>1</sup> But Lord Hale laid down the law, which has been followed since his day, that although sunset was the time appointed by law to demand rent, in order to take advantage of a condition of re-entry in case of its non-payment, and to tender it in order to save a forfeiture, yet that, in strictness, the tenant has all the day to pay it, and that it is not, therefore, past due until after midnight, or the last minute of the natural day whereon it is made payable.<sup>2</sup> For this reason, if a tenant is evicted by his landlord at any time of the day when rent is payable, it will operate as an extinguishment of the whole rent.<sup>3</sup> The day of payment generally depends upon the contract, but is sometimes regulated by custom. It may be made payable in advance;<sup>4</sup> but if there is no special agreement to

kind, and the lessor died before the crops matured, the executor, and not the heir, was held entitled. *Wadsworth v. Alcott*, 6 N. Y. 64.

<sup>1</sup> Co. Lit. 202, a. For the requirements of a common-law demand, see *post*, § 493. Where a lessee covenants to pay rent on particular days within the time of payment, the lessor's right to sue for rent in case of non-payment is extended or postponed beyond those days by the lessee's further covenant that the lessor may, after sixty days' default in payment, take and keep possession of the demised premises. *Rowe v. Williams*, 97 Mass. 163. A subsequent agreement may, by relation, operate to make a reservation of rent from this beginning. *McLeish v. Tate*, Cowp. 781. But parol evidence is not admissible to prove an additional rent payable by a tenant beyond that expressed in the written agreement. *Preston v. Merceau*, 2 W. Bl. 1249.

<sup>2</sup> *Duppa v. Mayo*, *supra*; *Dalton v. Landahn*, 27 Mich. 529.

<sup>3</sup> *Smith v. Shepard*, 15 Pick. 147.

<sup>4</sup> *Giles v. Comstock*, 4 N. Y. 270; *Conway v. Starkweather*, 1 Den. 113. Where there was a stipulation for rent to commence at Michaelmas, and to be paid three months in advance, such advance to be paid on taking possession, held, that the stipulation could only go for the advance of the first quarter's rent. *Holland v. Palser*, 2 Stark. 161. A lease "from" April 1, but rent payable April, July, October, and January 1, with careful stipulations for the lessor's security for the payment of rent, was

the contrary, payment will be due, either yearly, half-yearly, or quarterly, according to the usage of the country where the premises are situated, and the presumed intention of the parties to conform to it. If there be no usage or agreement in the case, rent is not due until the end of the term.<sup>1</sup> We have seen that, in the city of New York, in the absence of any special agreement, rent is payable on the usual quarter-days, by statute.<sup>2</sup> When payable in money, interest is allowed to be recovered upon rent in arrear from the time it became due, at least in New York, Pennsylvania, Delaware, and Maryland;<sup>3</sup> and such is believed to be the general rule. But

held to intend payment of rent in advance. *Deyo v. Bleakley*, 24 Barb. 9. But where rent was to be paid in advance, but there was to be a discount if paid in five days, it was held not overdue till the five days ended. *White v. McMurray*, 2 Brewst. 484. As to payments in advance by a mortgagor's tenant, see *ante*, §§ 119, 121, and notes.

<sup>1</sup> 3 Kent, Com. 374; *Menough's Appeal*, 5 W. & S. 432; *Raymond v. Thomas*, 24 Ind. 476; *Elmer v. Sand. Cr.*, 38 *id.* 56; *Campbell v. Hatchett*, 55 Ala. 548; *Tignor v. Bradley*, 32 Ark. 781. So where rent is payable in kind. *Dixon v. Niccolls*, 39 Ill. 372; *Lamberton v. Stouffer*, 55 Pa. St. 284. If rent is payable quarterly, nothing is due until the time stipulated for payment arrives. *Wood v. Partridge*, 11 Mass. 488; *Fitchb. Man. Co. v. Melven*, 15 *id.* 268. So where the contract provides for annual payments. *McFarlane v. Williams*, 107 Ill. 33. If the lease specifies no particular time of payment, an agreement to pay quarterly may be inferred from the fact that the lessor had demanded it quarterly, and the tenant had frequently so paid it. *L. I. R. R. Co. v. Marquand*, 6 N. Y. Leg. Obs. 160. In a reservation of rent "payable in quarterly or monthly payments," it was held that the alternative was for the benefit of the landlord, and not of the tenant. *Pemberton v. Van Rensselaer*, 1 Wend. 307. And on a lease in fee payment of rent may be presumed after twenty years. *Lyon v. Odell*, 65 N. Y. 28.

<sup>2</sup> Under a lease in the city of New York, from the first of October to the first of May, at a yearly rent, payable quarterly, it was held that the rent was payable on the usual quarter-days, that is, one month's rent on the first of November, and thenceforth quarterly. *Wolf v. Merritt*, 21 Wend. 356. Otherwise held of a lease from the tenth day of the month, for a term of years to end on the first day of the month. *Curtiss v. Miller*, 17 Barb. 477.

<sup>3</sup> *Clark v. Barlow*, 4 Johns. 183; *Obermyer v. Nichols*, 6 Binn. 159; *Dorrill v. Stevens*, 4 McCord, 59; *Dennison v. Lee*, 6 Gill & J. 383; *Stockton v. Guthrie*, 5 Harr. 204; *McQuesney v. Hiester*, 33 Pa. St. 435. A tender of money does not extinguish the debt; it merely stops the

in North Carolina, it is held not to be recoverable by way of damages, in an action of debt for rent;<sup>1</sup> nor in Louisiana, except from the time of the judicial demand.<sup>2</sup> In Virginia, it depends upon circumstances to be determined by the jury; but is not to be allowed where it appears that there were effects upon the premises liable to distress, sufficient to have satisfied the rent.<sup>3</sup> Mississippi leaves it in the discretion of the court to allow interest or not, as it shall deem proper;<sup>4</sup> while in New York, it was held that, in an action of covenant for the non-payment of rent, on a lease reserving a certain number of bushels of wheat and a number of fowls annually, the plaintiff is entitled, as matter of law, to interest on the value of the property after the time when, by the terms of the lease, it should have been delivered.<sup>5</sup>

§ 392. **Place of Payment of Rent.** — In regard to the place of payment, it is to be observed that, when rent *in kind* is payable by the terms of the lease at such a place in a market-town as the lessor shall appoint, *and no appointment has been made*, it is the duty of the lessee to seek the lessor, ascertain the place of payment, and there deliver his rent. If the landlord cannot be found, a delivery anywhere within the market-town would be sufficient. And whether payable in money, or in kind, if no place of payment is specified, a tender of either upon the land is good, and prevents a forfeiture.<sup>6</sup> Although

running of interest. *Raymond v. Bearnard*, 12 Johns. 274; and see 2 N. Y. R. S. 554, § 20, and *Brown v. Ferguson*, 2 Den. 196.

<sup>1</sup> *Cooke v. Wise*, 3 Hen. & M. 463; but may be from the time of commencing the action, or if the reception of the profits was tortious: *Benzein v. Robinett*, 2 Dev. Eq. 67.

<sup>2</sup> *Perret v. Dupré*, 19 La. 341.

<sup>3</sup> *Mickie v. Lawrence*, 5 Rand. 571; *Dow v. Adam*, 5 Munf. 21.

<sup>4</sup> *Howcott v. Collins*, 23 Miss. 398.

<sup>5</sup> *Van Rensselaer v. Jewett*, 5 Den. 135; s. c. 2 N. Y. 135; and see *Roush v. Emerick*, 80 Ind. 551. The price of wheat in a market-town on a grain day, obtained from the books of the dealers, is *prima facie* evidence of its value. *Lush v. Druse*, 4 Wend. 313.

<sup>6</sup> *Lush v. Druse*, *supra*; *Walter v. Dewey*, 16 Johns. 222; *Van Rensselaer v. Jones*, 5 Den. 453; *Fordyce v. Hathorn*, 57 Mo. 120. The effect of a valid tender of specific articles, where, by the terms of the contract, payment is to be so made, is to discharge the debt, and to transfer the

the tenant is under no obligation to go and seek the landlord, provided the contract is silent as to the place of payment, a personal tender to him anywhere is held to be sufficient.<sup>1</sup> And when payable in kind, at such place as the lessor shall from time to time appoint, the lessor may sustain an action on the lease for the value of the rent, without averring or proving that he directed the lessee where to deliver it. But upon such a lease, if the lessor gives directions where to make payment, the lessee must be prepared to pay according to the directions.<sup>2</sup>

§ 393. **Tender of Money for Rent. — How made. — When dispensed with.** — A tender of money is its actual production and manual offer to the party entitled to payment. It is not enough for the party to say, I am ready to pay the debt, or perform the duty; he must offer to pay the one or discharge the other.<sup>3</sup> He must declare on what account his offer is made, and actually produce the money, and not keep it in his pocket; but he may offer a bag with the money in it, and it is then the creditor's duty to examine and count it.<sup>4</sup> The production of the money, however, may be dispensed with by the hostile conduct of the creditor; as, if he absolutely refuses to receive it; or, if he objects to receive it because it is too

ownership of the articles tendered to the creditor, notwithstanding he may refuse to accept it. *Des Arts v. Leggett*, 16 N. Y. 582; *Lamb v. Lathrop*, 13 Wend. 95. Thenceforth the lessee holds them as bailee, at the risk and expense of the other party. *Sheldon v. Skinner*, 4 Wend. 525; *Slingerland v. Morse*, 8 Johns. 477.

<sup>1</sup> *Walter v. Dewey*, *supra*; *Slingerland v. Morse*, *supra*; *Hunter v. Leconte*, 6 Cow. 728; *Soward v. Palmer*, 8 Taunt. 277; *Tinckler v. Prentice*, 4 *id.* 549.

<sup>2</sup> *Livingston v. Miller*, 8 N. Y. 283; s. c. 11 *id.* 80. See *post*, § 565; and generally as to a discharge of the obligation to pay rent, see the various actions for rent treated of in chapter xiii.

<sup>3</sup> *Bakeman v. Pooler*, 15 Wend. 637; *Sheredine v. Gaul*, 2 Dall. 190; *Horn v. Luines*, 12 Mod. 353; *Dunham v. Jackson*, 6 Wend. 22. No tender, if the money has been fraudulently obtained. *Reed v. Bank of Newburgh*, 6 Paige, 337.

<sup>4</sup> *Bakeman v. Pooler*, *supra*; *Dickinson v. Shee*, 4 Esp. 68; *Glancott v. Day*, 5 *id.* 48; *Sheredine v. Gaul*, *supra*; *Wade's Case*, 5 Co. 115; 1 Inst. 208; *Firth v. Purvis*, 5 T. R. 432.



much, or because it does not amount to the debt due, together with another debt which he also insists on receiving at the same time; or, where he tells the party he need not produce the money.<sup>1</sup> But the circumstance of demanding more than is due is not sufficient to excuse tender of what is due.<sup>2</sup> It must also be without qualification or condition, or any intention of cutting off some other claim beyond the amount tendered; as, if the debtor, at the time of the tender, demands a receipt in full of all demands; although he may ask a written receipt or acknowledgment for the amount paid.<sup>3</sup> The tender must ordinarily be made directly to the creditor; and if made to an agent or other person, it must be shown that he had authority to receive it.<sup>4</sup>

§ 394. **Tender of Specific Articles. — Of Coin. — Of Bank-notes.** — As to a tender of specific articles, the authorities agree that the party making the tender must do everything in his power to place himself in a state of perfect readiness to perform, or the tender will not be complete, whether the creditor be present or not.<sup>5</sup> It is a general rule, also, applica-

<sup>1</sup> Cow. Treatise, 794; *Douglas v. Patrick*, 3 T. R. 683; *Black v. Smith, Peake*, 88; *Stone v. Sprague*, 20 Barb. 509; *Holmes v. Holmes*, 12 *id.* 137; *Vaupell v. Woodward*, 2 Sandf. Ch. 143.

<sup>2</sup> *Dunham v. Jackson*, 6 Wend. 22; *Thomas v. Evans*, 10 East, 101; *Kraus v. Arnold*, 7 Moore, 59.

<sup>3</sup> *Wood v. Hitchcock*, 20 Wend. 47; *Ryder v. Townsend*, 7 Dow. & R. 119; *Fishburne v. Saunders*, 1 Nott & M. 242. A tender upon condition that certain securities shall be surrendered, to which the debtor is not entitled, or that the holder of the obligation will ratify an arrangement made concerning another matter, is in either case bad. *Brooklyn Bank v. Degrauw*, 23 Wend. 342; *Eddy v. O'Hara*, 14 Wend. 221.

<sup>4</sup> *Hornby v. Cramer*, 12 How. Pr. R. 490; *Smith v. Smith*, 2 Hill, 351; *Hargous v. Lahens*, 3 Sandf. 213. If the creditor, knowing the day on which payment ought to be made, voluntarily absents himself from home on that day, under circumstances indicating an intention to avoid the debtor, a tender by the latter to any person whom he may find at the creditor's house, is good. *Judd v. Ensign*, 6 Barb. 258; *Smith v. Smith*, 25 Wend. 405.

<sup>5</sup> *Clark v. Tyson*, 1 Stra. 504; *Coit v. Houston*, 3 Johns. Cas. 253, per Radcliff, J. And an agreement for a certain time to take money instead of such articles, will not discharge such a covenant. *Lilley v. Fifty Assoc.*, 101 Mass. 432.

ble to all cases of tender, that where any act yet remains to be done to prepare the goods for delivery, the property does not pass until that act has been done ; for the essential object of identifying the goods, and giving the tenderee a remedy for them, by caption, trover, or other action to obtain the goods or the value of them, is not yet obtained. And this is essential, for the party should not be deprived of all remedy upon his contract, unless another remedy is furnished him by passing the property of the chattels, and placing them completely under his control.<sup>1</sup> Strictly, a tender must be made in gold and silver coin made current by acts of Congress of the United States.<sup>2</sup> Such coin as is issued from the mint may be counted, and the creditor must take it according to its nominal value. But, with regard to foreign coin, the creditor may decline to receive it, except by its true weight and value.<sup>3</sup> Bank-notes

<sup>1</sup> *Newton v. Galbraith*, 5 Johns. 119; *McDonald v. Hewett*, 15 *id.* 351; *Whitehouse v. Frost*, 12 East, 621; *Wallace v. Breeds*, 13 *id.* 522; *Nichols v. Whiting*, 1 Root, 443.

<sup>2</sup> By the Act of Congress, of March 3, 1863, treasury notes of the United States were made legal tender, and it was repeatedly held under this act that all contracts, including those specifically agreeing for gold or silver coin, could be discharged either in law or equity by these notes at par. *Thomson v. Riggs*, 5 Wall. 663; *Frothingham v. Morse*, 45 N. H. 545; *Wood v. Bullens*, 6 Allen, 516; *Buchegger v. Shultz*, 13 Mich. 420; *Graham v. Marshall*, 52 Pa. St. 28; *Thayer v. Hedges*, 23 Ind. 141; *Whetstone v. Colley*, 36 Ill. 328; *Henderson v. McPike*, 35 Mo. 255. The U. S. Supreme Court, however, overruled these decisions, in the case of *Bronson v. Rodes*, 7 Wall. 229, and held that contracts specifically for coin can only be discharged in coin or in currency with the premium; and this was followed in *Butler v. Horwitz*, *id.* 258. The rule had, however, always prevailed that where the contract was for gold or silver, not as money, but by weight, it became a commodity, and not a currency, and could only be satisfied by gold or silver, or by currency with the premium added. *Essex Co. v. Pacific Mills*, 14 Allen, 389, where a perpetual annual rent was reserved of 260 ounces of silver of a specified fineness. So *Dutton v. Pailaret*, 52 Pa. St. 109; *Sears v. Dewing*, 14 Allen, 413.

<sup>3</sup> Spanish milled dollars, and their proportional parts, were declared current in the United States, and a legal tender, by Act of April 10, 1806. The dollar of Mexico, Peru, Chili, and Central America, Bolivia, and Spanish pillar dollars of the requisite weight and fineness, are receivable by tale in payment of debts for one hundred cents each; and the five-franc piece of France for ninety-three cents, by Acts of June 25, 1834, and March 3, 1843. The gold coins of Great Britain at 94 6-10 cents per

constitute a part of the currency of the country, and ordinarily pass for money, and a contract will, in the absence of proof to the contrary, be presumed to have been made with reference to the currency in which business is usually transacted.<sup>1</sup> When bank-notes are received in payment, the receipt is always given for them as money; and they are a good tender as money, unless specially objected to by the creditor at the time of the offer.<sup>2</sup>

### SECTION III.

#### THE COVENANT TO PAY TAXES, CHARGES, AND ASSESSMENTS.

§ 395. **Tenant to Pay, and Landlord to Reimburse.** — As a general rule, the tenant is liable in the first instance to pay all taxes imposed upon the demised premises. The land itself, in the hands of the occupant, is in fact debtor to the public, and *prima facie* it is the tenant's tax, because all the remedies are against him. He is, therefore, for his own protection, authorized to pay all such taxes and assessments laid

pennyweight, of France, at 92 9-100 cents per pennyweight, by Act of March 3, 1843; and the gold coins of Portugal and Brazil, 22 carats fine, at 94 8-10 cents per pennyweight, and of Spain, Mexico, and Columbia, 20 carats 3 7-16 grains fine, at the rates of 89 9-10 cents per pennyweight, by Act of June 28, 1834, are made current, and receivable by weight for the payment of all debts and demands. Gold coins are to be received at their respective values for debts of any amount; half-dollars and other minor denominations of silver for debts under five dollars; and cents only for dues under ten cents.

<sup>1</sup> *Fabbri v. Kalbfleisch*, 52 N. Y. 28.

<sup>2</sup> Per Story, J., *U. S. Bank v. Bank of Georgia*, 10 Wheat. 347. Counterfeit notes, or notes which prove to be of no value, are no payment, although they were paid in good faith, and supposed to be genuine. *Markle v. Hatfield*, 2 Johns. 455; but see *Benedict v. Field*, 4 Duer, 154. When a bank stops payment, its bills cease to be a representative of the legal currency, whether the holder is aware of the suspension or not. If such bills are passed to one who is ignorant of the failure of the bank, they are no payment. *Ont. Bank v. Lightbody*, 13 Wend. 101. That the creditor may return a counterfeit bank-note, in a reasonable time, see *Thomas v. Todd*, 6 Hill, 340.

upon the premises for public improvements, as may be demanded of him, and to charge them to account of rent.<sup>1</sup> And the landlord is bound to indemnify his tenant against all such charges as he has been obliged to pay, and for which the landlord was ultimately liable.<sup>2</sup> Whenever, therefore, a tenant advances the tax, ground-rent, assessment, or other prior charge on the land, he may look to the landlord for it, and recover the amount paid in an ordinary suit at law, or deduct it out of the rent, unless it is provided by the lease that the tenant shall pay it as part of or in addition to the rent; or unless the statute holds the tenant absolutely for it.<sup>3</sup> Nor is it necessary, for the purpose of rendering the payment an involuntary one, that the superior lord should threaten to distrain, for a demand by one who has power to enforce his claim, is equivalent to compulsion; and such a payment, to use the words of Best, C. J., is no more voluntary than a donation to a beggar who presents a pistol.<sup>4</sup> And if the sum paid by the tenant exceeds the rent due to the landlord, it will create an obligation on the part of the landlord to repay such excess, as money paid by the tenant to his use.<sup>5</sup>

§ 396. **English Rule as to Yearly Taxes.** — According to the English law, a tenant must deduct each year's tax from each year's rent; for, if the deduction is not made from the rent

<sup>1</sup> *Tinckler v. Prentice*, 4 Taunt. 549; *Gabell v. Shevell*, 5 Taunt. 81. It would seem that, in Maryland, if no mention is made of taxes in the lease, they are payable by the tenant, and do not constitute a set-off to the payment of rent. *Hughes v. Young*, 5 Gill & J. 67.

<sup>2</sup> *Sapsford v. Fletcher*, 4 T. R. 511; *Stubbs v. Parsons*, 3 B. & A. 516; and see *ante*, § 341.

<sup>3</sup> 1 N. Y. R. S. 410, § 73; 419, § 6; *Hunt v. Amidon*, 4 Hill, 349; *Taylor v. Zamira*, 6 Taunt. 524; *Clennell v. Read*, 7 Taunt. 50; *Dawson v. Linton*, 5 B. & A. 521; *Ward v. Const*, 10 B. & C. 635; *Garner v. Hannah*, 6 Duer, 262.

<sup>4</sup> *Carter v. Carter*, 5 Bing. 406.

<sup>5</sup> Per Burroughs, J., in *Taylor v. Zamira*, *supra*. This must be taken to refer only to what the landlord is ultimately to pay. By the statutes imposing the land-tax or property-tax, however, the tenant can only deduct according to the proportion borne by the rent to the real annual value; anything in excess of this is for the tenant himself to bear. *Watson v. Home*, 7 B. & C. 285; *Ward v. Const*, 10 *id.* 635, 649.

of the current year, the tenant will not be allowed to deduct, in any subsequent year, the amount of the tax so omitted to be deducted.<sup>1</sup> And, therefore, where an occupant of lands, during a course of twelve years, paid to the collector of taxes the landlord's property-tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax, he was not permitted to set off any part of the property-tax so paid, in the landlord's action for rent.<sup>2</sup> And though he may recover such payments from the landlord by a separate action,<sup>3</sup> he cannot do this if he has paid thereafter his rent in full to his landlord without compulsion or objection. Such a payment will be treated as a voluntary one with full knowledge of the facts and not recoverable.<sup>4</sup>

§ 397. **Tenant's Covenant to pay. — Public Duties, etc. —** But the obligation to pay taxes strictly so-called, or even more extensive or permanent charges or assessments, may be assumed by the tenant by an express covenant to that effect.<sup>5</sup> Where

<sup>1</sup> *Stubbs v. Parsons*, *supra*; *Andrew v. Hancock*, 1 Brod. & B. 37; *Spragg v. Hammond*, 2 *id.* 59.

<sup>2</sup> *Denby v. Moore*, 1 B. & A. 123. But an agreement by the landlord for sufficient consideration to repay the property-tax paid by the landlord is not invalid. *Lamb v. Brewster*, 4 Q. B. D. 220. This restriction of the tenant's right to deduct the tax only from the current year's rent does not exist in the statutes of the several States; but a general right to deduct "from any rent due" is there given. N. Y. R. S. 419, § 4; *id.* 483, § 83, Mass. Pub. St. c. 11, § 17. These statutes also give a right of recovery by action against the landlord for the amount of the taxes so paid. It seems, therefore, that in these States the rule laid down by the English courts, that the tenant's right of action is barred after a subsequent and voluntary payment of rent in full, cannot prevail.

<sup>3</sup> *Baker v. Greenhill*, 3 Q. B. 148.

<sup>4</sup> *Denby v. Moore*, *supra*; *Cumming v. Bedborough*, 13 M. & W. 558.

<sup>5</sup> *Payne v. Burrige*, 12 M. & W. 72; *Parish v. Sleeman*, 1 De G. F. & J. 326; *Fernwood Masonic Hall Ass'n. v. Jones*, 102 Pa. St. 307, where the covenant was to pay for all the gas consumed on the premises, and it was held that sums due for such gas might be distrained for as rent. In Massachusetts, by construction of the statute, it is held that the lessee in order to prevent a forfeiture of his estate, after notice to quit for non-payment of rent, need not tender with the rent the taxes due, and which the lessor has paid in order to prevent a tax-sale of the premises; although the lease contains a covenant that the lessee shall pay the taxes.

the tenant's covenant is only to pay rates, taxes, or public dues, while the ordinary annual taxes are included,<sup>1</sup> it has been held that he is not liable to an assessment of an extraordinary or unusual character, or for a permanent improvement enuring to the benefit of the reversion.<sup>2</sup> Thus, a tax upon the rent reserved is not a tax which he is bound to discharge under a general covenant to pay taxes.<sup>3</sup> Nor under a covenant to pay rent over all taxes, charges, or impositions is he held for any tax imposed upon the owner not in respect of the land.<sup>4</sup> And even where the language of the covenant is to pay all taxes and assessments, the tenant is not bound to pay the tithe rent-charge, which is never intended by these words, and is only payable by the tenant when the landlord is to receive his rent free of all "outgoings."<sup>5</sup> So, where the terms of the statute imposing the assessment are clearly lim-

*Hodgkins v. Price*, 137 Mass. 13. The lessee's omission to pay a municipal assessment is not a breach of the covenant if the omission arises from a question as to the validity of the assessment, and he pays the assessment when such validity is established. *Eberts v. Fisher*, 54 Mich. 294.

<sup>1</sup> *Garner v. Hannah*, 6 Duer, 262.

<sup>2</sup> *Twycross v. Fitchb. R. R.*, 10 Gray, 293; *Balling v. Stokes*, 2 Leigh, 178; *Munic. No. 2 v. Curell*, 13 La. 318; *Beals v. Prov. R. R.*, 11 R. I. 381. In *Love v. Howard*, 6 *id.* 116, the same rule was applied, though the covenant included "assessments" *eo nomine*; but the court go mainly on the ground that the act imposing the assessment preceded the lease, and it could not have been in the contemplation of the parties.

To the same effect are the numerous cases in which an exemption from taxation has been held not to include an assessment for a permanent benefit, or one accruing solely to the reversion. *Second Cong. Soc. v. Providence*, 6 R. I. 235; *Matter of College St.* 8 *id.* 474, and cases there cited. It is here held that while laying an assessment either for the expense of an improvement, or for the assumed benefit resulting from it to an estate, is an exercise of the taxing power, yet it is not a tax in the ordinary sense of the term, but in the nature of a return of a benefit conferred; and therefore not included under the terms *taxes or taxation*. In *Harv. Coll. v. Boston*, 104 Mass. 476, the terms of exemption were broader, and an assessment for a betterment was held to be included under the words "civil imposition."

<sup>3</sup> *Van Rensselaer v. Dennison*, 8 Barb. 23.

<sup>4</sup> *Palmer v. Power*, 4 Ir. C. L. 191.

<sup>5</sup> *Jeffrey v. Neale*, L. R. 6 C. P. 240.

ited to the owner, the tenant will not be liable for a permanent improvement, even under a covenant by which he agrees to pay all taxes, rates, assessments, and impositions.<sup>1</sup>

§ 398. **Covenant to pay all Taxes.** — **Construction of.** — But where the tenant has covenanted to pay all taxes, and that the landlord shall get his rent free from all deductions, the former will be held to assume absolutely all such taxes as he otherwise would have borne primarily, but have recovered from the landlord or deducted from the rent.<sup>2</sup> And though the permanency of the improvement which is the cause of the assessment is a proper element in determining on whom the burden shall fall,<sup>3</sup> this character will not exempt the tenant

<sup>1</sup> *Tiddswell v. Whitworth*, L. R. 2 C. P. 326; *Rawlins v. Briggs*, 3 C. P. D. 368; *Hartley v. Hudson*, 4 *id.* 367; *Budd v. Marshall*, 5 *id.* 481; *Weber v. Reinhard*, 73 Pa. St. 370. *Twycross v. Fitchb. R. R. supra.* The mere lessee for ten years is not the "owner" of the property within the meaning of a statute to enforce a sewer assessment. *Davis v. Cincinnati*, 36 Ohio St. 24.

<sup>2</sup> Thus, in *Bennett v. Womack*, 3 C. & P. 96, 7 B. & C. 627, agreeing to take a lease at a *net* rent binds him to pay the land-tax and sewers rate, which are properly the landlord's taxes. So where he verbally agrees to pay *all taxes*, he is bound to pay the land-tax, though it is not specially mentioned. *Amfield v. White*, Ry. & M. 286. And where in addition to the covenant to pay taxes, he is to pay the landlord his rent *free of all outgoings*, the tenant must bear the tithe-rent charge, which by law he is to pay in the first instance and then deduct. *Parish v. Sleeman*, 1 De G. F. & J. 326.

<sup>3</sup> Thus it was noticed in *Payne v. Burrridge, supra*, but the court said the language of tenant's covenant was "too strong to be got over." In *Sweet v. Seager*, 2 C. B. N. S. 119, it was in like manner recognized, but controlled by the extremely broad terms of the covenant. In *Thompson v. Lapworth*, L. R. 3 C. P. 149, it was said by Willes, J.: "The substance of the argument is this, that the duties intended by this covenant are not occasional or exceptional expenses incurred once for all in respect of permanent and substantial improvements, but duties or assessments accruing from year to year, or occasionally matters of a recurring character. The argument is a strong and captivating one, and one to which I might have yielded if it had not been excluded by decisions which ought to bind us. I cannot, without carping at words, point out any distinction between the case of *Payne v. Burrridge* and the case now before us." And in *Crosse v. Raw*, L. R. 9 Exch. 309, Bramwell, B., remarked: "I go a long way with the argument which my brother Willes described, in *Thompson v.*



if the language of his covenant refers specially to the kind of assessment;<sup>1</sup> or includes all assessments;<sup>2</sup> or is to hold the landlord free from all deductions of rent.<sup>3</sup> And if the tenant's covenant includes all burdens during the term, he is liable, even though the assessment is not laid or the law imposing the assessment is not passed until after the lease is made.<sup>4</sup> It is held in Massachusetts that, under his covenant to pay taxes and assessments, the tenant is liable not merely for the expense of the improvement, but in the proportion of the betterment so-called, that is, of the assumed benefit resulting to the whole estate, including the reversion, from the improvement,<sup>5</sup>—even when the covenant is, to pay *taxes* and *duties* only.<sup>6</sup> But the current of American as well as of English

Lapworth, as a captivating one, that the landlord may be liable for what may be called capital expenditure, but not for expenditure which should be charged to revenue.”

<sup>1</sup> Waller v. Andrews, 3 M. & W. 312. Here a covenant to pay all taxes, *scots*, &c., was held to include the cost of building a sluice, “which was clearly a scot.”

<sup>2</sup> Bleecker v. Ballou, 8 Wend. 263; Mayer v. Cushman, 10 Johns. 96; Oswald v. Gilfert, 11 *id.* 443; Codman v. Johnson, 104 Mass. 491; Payne v. Burrridge, *supra*; Aster v. Miller, 2 Paige, 68.

<sup>3</sup> Parish v. Sleeman, *supra*.

<sup>4</sup> Post v. Kearney, 2 N. Y. 394; Des Moines v. Dorr, 31 Iowa, 89; Curtis v. Pierce, 115 Mass. 186.

<sup>5</sup> Codman v. Johnson, *supra*; Walker v. Whittemore, 112 Mass. 87.

<sup>6</sup> Simonds v. Turner, 120 Mass. 188. It is noticeable how much the terms have been narrowed which are held to subject the tenant to this extraordinary liability. In Codman v. Johnson, *supra*, the judgment was rested in some degree on the facts that the covenant was to pay *assessments*, that the lease was for twenty years, and was made after the statute imposing the burden; and hence that an assessment for a permanent benefit might well have been in the parties' contemplation. In Curtis v. Pierce, the statute was after the lease; but the covenant was very broad, and the lease was for ten years. In Blake v. Baker, 115 Mass. 188, however, the lease was but for three years, though made indeed after the passage of the statute; and the covenant was to pay *taxes or duties* only. Finally, in Simonds v. Turner, the tenant was held liable under a covenant to pay *taxes and duties* for an assessment for a betterment of a character unknown when the lease was made, imposed by a statute passed after the date of the lease, and when this had but a few years to run. It may be well to contrast the words of the covenant in this case with those employed in the leases in Sweet v. Seager, Payne v. Burrridge, or Thomp-

authority is the other way, and in one case even the word assessments was held insufficient to subject the tenant to this burden.<sup>1</sup>

§ 399. **Taxes relate to assumed Day of Valuation. — Lessor's Remedy for Non-payment of.** — A tax is in legal contemplation assessed and becomes a debt on the day the property is assumed to be valued, although the actual work of assessment is not completed until long after; and the tax is legally payable from that day. A covenant, therefore, by the tenant to pay all taxes payable during the term includes a tax laid before the term expires, though the day of its levy or actual payment falls without the term;<sup>2</sup> and the rule is the same though the expense which the tax is collected to meet was incurred before the lease began.<sup>3</sup> Upon the lessee's neglect to pay, a cause of action at once accrues to the lessor, and he may either pay the tax and sue the lessee for the amount,<sup>4</sup> or may sue without first so paying it himself.<sup>5</sup> Hence, if the premises are destroyed, the obligation to pay the taxes still continues and binds the lessee,<sup>6</sup> even though the lease contains an agreement by the lessor to rebuild, and a stipulation for abatement of the rent until this is done.<sup>7</sup> And though the

son *v. Lapworth*, *supra*, or with the language of the court in *Harvard Coll. v. Boston*, 104 Mass. 471, 483: "In a lease for years, especially if for a short term, containing a covenant that the tenant shall pay all taxes assessed upon the premises, it would hardly be supposed that the parties intended that the lessee should pay an extraordinary assessment laid upon the premises, in view of the permanently increased value of the estate by reason of a public improvement in the vicinity, unless the terms used were such as to admit of no other construction."

<sup>1</sup> *Love v. Howard*, 6 R. I. 116; *Sharp v. Speir*, 4 Hill, 76; *Pray v. North. Lib.*, 31 Pa. St. 69; *Matter of the Mayor*, 11 Johns. 77; and cases *supra*. § 397, n.

<sup>2</sup> *Wilkinson v. Libby*, 1 Allen, 375; *Amory v. Melvin*, 112 Mass. 83; *Waterman v. Harkness*, 2 St. Lo. M. App. 494.

<sup>3</sup> *Shepardson v. Elmore*, 19 Wisc. 424.

<sup>4</sup> *Hackett v. Richards*, 3 E. D. Smith, 13.

<sup>5</sup> *Trinity Ch. v. Higgins*, 48 N. Y. 532.

<sup>6</sup> *Wood v. Bogle*, 115 Mass. 30; *Paul v. Chickering*, 117 *id.* 265; *Sargent v. Pray*, *id.* 267.

<sup>7</sup> *Minot v. Joy*, 118 Mass. 308.

lease is terminated by the lessor or lessee after the day when the tax becomes a debt, no apportionment takes place for the yet unexpired portion of the tax year.<sup>1</sup> But where the terms of the covenant are only to pay taxes "levied" during the term, a tax assessed only will not be included.<sup>2</sup>

## SECTION IV.

### THE COVENANT TO INSURE.

§ 400. **Not an Implied Covenant. — Is a Personal Obligation. — Construction of.** — A covenant is sometimes inserted in a lease requiring the tenant to insure the premises, and in case of damage by fire, to apply the money to be received for insurance in rebuilding or repairing the premises. Without such a covenant, the tenant is under no obligation to effect an insurance; although, if it is a long lease, without a proper exception as to casualties, he might find it prudent to do so for his own protection. The bare covenant to insure is merely personal, extending only to the covenantor and his personal representatives, without binding the assignee of the term, and, in general, gives the landlord no right to receive the insurance-money from the insurers; but when it contains a clause for reinstating the premises with the insurance-money, he may not only require it to be so applied, but it becomes a covenant, running with the land, enabling the assignee of the reversion to maintain an action for its breach. And a similar effect will be given to this covenant wherever a statute requires the money to be so applied.<sup>3</sup> A covenant to insure and keep insured a given sum of money upon the premises, during the term, in some sufficient insurance office, means that the premises shall be kept insured against fire in some

<sup>1</sup> *Paul v. Chickering*, *Wood v. Bogle*, *Sargent v. Pray*, *supra*; *Carnes v. Hersey*, 117 Mass. 269; *Howe v. Bryant*, *id.* 273, n.

<sup>2</sup> *Valle v. Fargo*, 1 Mo. App. 344; *Doane v. Fallon*, 3 *id.* 596.

<sup>3</sup> *Thomas v. Von Kapff*, 6 Gill & J. 372; *Vernon v. Smith*, 5 B. & A. 1; *Spencer's Case*, 5 Co. 17; *Masury v. Southworth*, 9 Ohio St. 340.

office where insurances against fire are usually effected;<sup>1</sup> not that the lessee shall effect any one policy, and keep that particular one on foot, but that he, his executors, and assigns, shall always keep the premises insured in the required amount by one policy or another; and this covenant will be broken if the premises are left uninsured for any time, however short.<sup>2</sup>

§ 401. **With Covenant to keep in Repair, Effect of.** — If the tenant covenants to keep the premises in repair, and also to insure them for a specific sum against fire, on their being burned down his liability on the former covenant is not limited to the amount of the sum insured under the latter, but he is bound to put the premises in as good order as they were in when he accepted the lease, notwithstanding the sum insured may not be sufficient for that purpose.<sup>3</sup> Where the defendant covenanted to keep the premises insured during the term, and the policy of insurance declared that only fifteen days beyond the quarter-day should be allowed for the payment of the premium, and he suffered the fifteen days to elapse before it was paid, but insured afterwards, — the court held the covenant broken, for the landlord ran the risk of fire from the fifteenth day to the time the insurance was renewed.<sup>4</sup> A forfeiture for the breach of this covenant will not, in general, be relieved against in equity, unless there has been a waiver of such forfeiture by a subsequent receipt of rent or the like; and, on the non-performance of the covenant, the lessor may enter as for

<sup>1</sup> *Doe v. Shewin*, 3 Camp. 185. See *Quincy v. Carpenter*, 135 Mass. 102.

<sup>2</sup> *Doe v. Peck*, 1 B. & Ad. 428. A change of tenants of the insured building, the policy being silent on the subject, does not invalidate the policy, though the first tenant may be a prudent, and the second a grossly careless, man. *Gates v. Madison Ins. Co.*, 5 N. Y. 469.

<sup>3</sup> *Digby v. Atkinson*, 4 Camp. 275. A covenant to keep a factory insured necessarily embraces an obligation to keep the fixed machinery necessary to the operations of the factory insured. *Mayhew v. Hardesty*, 8 Md. 479.

<sup>4</sup> *Doe v. Shewin*, *supra*. Where the covenant requires the tenant to keep the building insured in a certain sum, for the benefit of the landlord, an insurance effected by the lessee in his own name and for his own benefit is no compliance with the covenant. *Keteltas v. Coleman*, 2 E. D. Smith, 408.

the breach of a condition, if such right has been reserved in the lease, and may oust the assignee of the lessee, even although the lessor has distrained for rent with knowledge of the breach of the covenant, which was a waiver of the breach of condition up to the time of distress; for the subsequent non-insurance is held to be a continuing breach up to that time, and gives a right of re-entry for the forfeiture.<sup>1</sup>

## SECTION V.

### THE COVENANT NOT TO ASSIGN OR UNDERLET.

§ 402. **Not an Implied Covenant.**— Usually inserted in Lease. — The power of assignment is incident to the estate of every lessee, unless he has been restrained by the terms of his lease;<sup>2</sup> a covenant, however, not to assign or underlet the premises without the express permission of the landlord, accompanied by a clause of re-entry in case of breach, is frequently inserted

<sup>1</sup> *Doe v. Peck, supra.* As a breach of this covenant by non-insurance is a continuing breach, the receipt of rent by the landlord after the commencement of the non-insurance, waives only that portion of the breach which has then actually occurred. *Doe v. Gladwin*, 6 Q. B. 958. In this case, which is a strong illustration of the rule, the tenant had covenanted to insure the demised premises, and to keep them insured in the joint names of the landlord and of himself, and the lease contained a proviso for re-entry upon the breach of any of the covenants. The tenant insured in his own name only, but he showed the policy to the landlord, who approved of it, and accepted rent during the next three years up to Christmas, 1842. The premiums paid by the tenant at that period covered the year 1843. In January, 1843, the landlord assigned his reversion, and in that year the assignee brought ejectment for the forfeiture caused by the non-insurance in the joint names of the landlord and tenant; and it was held that the lease was forfeited, although no notice had been given to the tenant to alter the policy. See also *Penniall v. Harborne*, 11 Q. B. 368; *Doe v. Ulph*, 13 *id.* 204. A breach by failure to insure is a defect in the title, though the lessor has taken no advantage of it. *Wilson v. Wilson*, 14 C. B. 616. Nor will equity relieve. *Gregory v. Wilson*, 9 Hare, 688.

<sup>2</sup> *Greenaway v. Adams*, 12 Ves. 395. The power exists without any insertion of the word *assigns* in the lease. *Id.*

in a lease.<sup>1</sup> And although it seems to be a reasonable privilege that a man shall exercise this restraint, for the salutary purpose of selecting such tenants as he is satisfied will take care of his property and pay rent punctually, it is a restraint which courts of law do not much favor.<sup>2</sup> In some cases the restriction extends to the whole duration of the term; in others, to a limited time only, such as for the last year of the term, or for the last two or three years; so that the lessor may find, on the determination of the lease, a responsible person in possession of the property, to whom he may look for rent.

§ 403. **Express Covenants strictly Construed.** — Covenants of this description are construed by courts of law with the utmost jealousy, to prevent the restraint from going beyond the express stipulation.<sup>3</sup> If, therefore, the lessee covenants

<sup>1</sup> When the lease contains such a covenant, equity will not compel the lessee to execute his agreement to assign to a third party, for such party must treat the lease as subsisting, including the covenant. *Willmot v. Barber*, 15 Ch. D. 96.

<sup>2</sup> *Church v. Brown*, 15 Ves. 265; *Crusoe v. Bugby*, 1 W. Bl. 766; *Cooney v. Hayes*, 40 Vt. 478; *Den v. Post*, 1 Dutch. 285. And the covenant being for the benefit of the lessor only, it is held that an assignment made without consent is not void, but merely voidable. *Webster v. Nichols*, 104 Ill. 160. And the assignment does not work a forfeiture without a declaration to that effect. *Eldredge v. Bell*, 64 Iowa, 125; and see § 492, *post*. A provision for re-entry in case of assignment exists in many of the manor leases in New York, having for at least one of its objects the exclusion of dangerous or improper persons among the landholders. It consists in a reservation to the proprietor of the quarter-sales, and a pre-emption right upon every alienation made by the tenants. Another reason for this reservation in these leases was, that it in fact constituted a part of the consideration of the original purchase of the premises, nothing having been paid by the tenants upon their receiving the grant of their lands from the patroon. All future reservations of fines or quarter-sales are now prohibited in New York, by the Constitution of 1846.

<sup>3</sup> *Doe v. Carter*, 8 T. R. 61. Thus, a covenant not to assign for benefit of creditors is not broken by an assignment not for creditors. *Phila. & E. R. R. v. Catawissa R. R.*, 53 Pa. St. 20. But ignorance on the part of the assignee of the restriction will not prevent the forfeiture. *Ind. & M. Union v. C. C. C. & S. R. R.*, 45 Ind. 201. The value of agricultural leases, of the duration of twenty-one years and under, depends so much

*not to assign, transfer, set over*, or otherwise do, or put away, the lease or premises, it does not prevent him from *underletting*.<sup>1</sup> Nor will a covenant "not to let or underlet the whole or any part" of the demised premises preclude an assignment of the whole interest.<sup>2</sup> But a condition not to *set, let, or assign over* the demised premises, or any part thereof, comprehends *under-leases*; and where the condition was, not to let or assign the premises, or any part thereof, a lease by the tenant, which fell short of his term by only one day, was held to be a breach of the condition.<sup>3</sup> So a covenant not to let, set, or demise the premises, or any part thereof, for the whole or any part of the term, restrains an assignment.<sup>4</sup> And

upon the personal character of the tenants that the rule in Scotland is, that they cannot be assigned or sublet without the landlord's consent; but the lease of a city's tenement is assignable, or may be underlet, unless there be a prohibitory clause. 1 Bell, Com. 75.

<sup>1</sup> Jackson v. Silvernail, 15 Johns. 278; Jackson v. Harrison, 17 *id.* 66; Crusoe v. Bugby, 3 Wils. 234; Hargrave v. King, 5 Ired. Eq. 430; Copland v. Parker, 4 Mich. 660; Leduke v. Mark, 47 *id.* 158.

<sup>2</sup> Lynde v. Hough, 27 Barb. 415. But the authorities are not agreed on this point. In Den v. Post, 1 Dutch. 285, a covenant against underletting was declared a bar to assignment. Greenaway v. Adams, 12 Ves. 395, was relied on, and in Woodfall, Landl. & T. (9th ed.) 553, and Platt, Cov. 408, the same view of the latter case is taken. But this case is qualified by Field v. Mills, 33 N. J. 254. In Blake v. Sanderson, 1 Gray, 332, Shumway v. Collins, 6 *id.* 227, 230, Shattuck v. Lovejoy, 8 *id.* 204, Bemis v. Wilder, 100 Mass. 446, the court treat the covenant against underletting as if it were a bar to assigning, but the distinction was not noticed; and, notwithstanding the covenant, the assignment in each case was sustained. These cases cannot be regarded as in point. Moreover, in Greenaway v. Adams, the words were not to "*set, let, or demise*." The court say, p. 400, "It would be strange if a lessor should restrain a partial and not total alienation." This is a mere *dictum*; and it would be sufficient reason for such restriction, that a lessor has no recourse against an under-tenant, but on an assignment has his remedy against the assignee and lessee at the same time. But the decision was correct on the words employed; and is so viewed, 2 Platt, Leases, 259; 1 Smith, L. C. 91. There seems, therefore, no good authority against the proposition in the text. A covenant not to underlet in which covenantor's assigns are not named, does not bind an assignee. 4 Kent, Com. 130; Dumpor's Case, 4 Co. 119; 2 Cruise, Dig. 7.

<sup>3</sup> Roe v. Harrison, 2 T. R. 425; Roe v. Sales, 1 M. & S. 297.

<sup>4</sup> Greenaway v. Adams, 12 Ves. 395. The word *set*, in this case, was construed to mean an assignment. But even a lease, if for the *whole* term,



where the proviso in the lease was that "if the lessee, his executors, or administrators, did or should assign, or otherwise part with, the lease or the premises thereby granted, or any part thereof, *for the whole or any part of the term thereby granted*, to any person or persons whomsoever, without the license and consent, in writing, of the lessor, first had and obtained for that purpose, the lessor might re-enter," and the lessee entered into an agreement with another person, to grant him a lease of the premises for the residue of the term, reserving a few days, under which possession was given,—Lord Ellenborough held that the words of the proviso included an under-lease, and that, consequently, such under-lease was a breach of the proviso.<sup>1</sup>

§ 404. **Covenant for Right of Pre-emption.** — A covenant in a lease in fee, that if the lessee or his assigns should sell, the lessor shall have the right of pre-emption, and be entitled to receive one-tenth of the purchase-money, was formerly held to be a valid covenant; the estate was declared forfeited, if that was made a condition of the breach of it; and it ran to and bound the lessee's assignee, even by operation of law.<sup>2</sup> But to impose a valid condition upon a grantee it is necessary that the grantor should retain some reversionary interest, and it was accordingly held, both at law and in equity, that in a lease in fee such a right of pre-emption was invalid, being against public policy as a restraint upon alienation on a grant in fee.<sup>3</sup>

§ 405. **Gratuitous Underletting.** — **To Partners.** — **To Lodgers.** — Where a lease provided that the landlord might re-enter in case the tenant should let the premises or any part thereof, or should convey them to any person whatsoever for all or any part of the term, without the license of the lessor; and the tenant, without such license, took a third person into would be an assignment. *Field v. Mills*, 33 N. J. 254, and *ante*, § 16, n. 5. But in *People v. Robinson*, 2 N. Y. 394, a different view is taken where there is a clause of re-entry. *Crusoe v. Bugby*, 3 Wils. 234.

<sup>1</sup> *Doe v. Worsley*, 1 Camp. 20.

<sup>2</sup> *Jackson v. Schutz*, 18 Johns. 174; *Jackson v. Groat*, 7 Cow. 285.

<sup>3</sup> *Livingston v. Stickles*, 8 Paige, 398. *DePeyster v. Michael*, 6 N. Y. 467; *Oberbagh v. Patrie*, *id.* 510. See *ante*, §§ 261, 285, and notes.

copartnership with him, and agreed to let him the back chamber with some other part of the premises exclusively, and the rest of the premises jointly with the lessee, and he was accordingly let into possession, — the court held this to be a breach of the proviso, whether the possession was given gratuitously or for rent.<sup>1</sup> But a covenant not to underlet without the consent of the lessor does not apply to a mere change in the business of the lessee's firm, incident to the admission of a new partner or the withdrawal of an old one.<sup>2</sup> Nor is it broken by taking in a lodger, although he may have had the exclusive possession of a room for a year or more; for, as Lord Ellenborough said, "the covenant can only extend to such underletting as a license might be expected to be applied for, and who ever heard of a license from a landlord to take in a lodger?"<sup>3</sup>

**§ 406. Hypothecation of Lease. — Advertising Premises. — Executor bound by the Covenant. — Depositing a lease as**

<sup>1</sup> *Roe v. Sales*, 1 M. & S. 297. If the vendor of a lease containing a covenant not to assign contracts to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's license. *Lloyd v. Crispe*, 5 Taunt. 249; *Austin v. Harris*, 10 Gray, 296; *Roberts v. Geis*, 2 Daly, 535, 537. He is bound, also, to show that he has obtained the lessor's consent. *Mason v. Corder*, 7 Taunt. 9. But this is a privilege of the assignee or sub-lessee only, and if they insist the lessee can avail himself of the prohibition to resist performance. *Blake v. Sanderson*, 1 Gray, 332; *Milkman v. Ordway*, 106 Mass. 232.

<sup>2</sup> *Roosevelt v. Hopkins*, 33 N. Y. 81; *Hargrave v. King*, 5 Ired. Eq. 480. So where a lease is jointly to two, and by an arrangement between them each occupies a several portion of the premises, such several use is not a breach of the covenant against underletting. *Boyd v. Fraternity Hall Ass'n*, 16 Bradw. (Ill.) 574. But in *Varley v. Coppard*, L. R. 7 C. P. 505, an express assignment by one partner to another on dissolution of the firm was held a breach of the covenant.

<sup>3</sup> *Doe v. Laming*, Ry. & M. 36. As to what is a lodger, see *ante*, § 66. In this case it was also held that such a transfer was also not within the words "otherwise part with" the possession. But in *Greenslade v. Tapscott*, 1 C. M. & R., a possession of part of the premises by verbal license was held within the prohibition against "permitting to occupy." In *West v. Dobb*, L. R. 5 Q. B. 460, an occupancy under a like verbal permission was held a breach of the condition against otherwise parting with the possession.

security for money is no breach of a covenant not to assign;<sup>1</sup> even though the covenant be not to let, set, assign, transfer, or *otherwise part with* the premises thereby assigned, or that present indenture of lease.<sup>2</sup> Nor can the mere act of advertising the leased premises for sale be construed into a breach of such covenant.<sup>3</sup> If a lessee covenant that he, his executors, or administrators, will not assign without license, and dies, the executor will be bound by the covenant, and cannot sell the premises for the payment of debts, without the license of the lessor, and it is the duty of the vendor and not of the purchaser, to procure the lessor's license for the assignment.<sup>4</sup> And if the lease contains a covenant that the lessee shall not assign without the permission of the lessor, an assignment of part of the premises with such consent is not equivalent to a surrender, but the lessee still remains liable for every act of the assignee which amounts to a breach of the covenant.<sup>5</sup>

§ 407. **Covenant against Particular Assignment.** — If the covenant prohibits an assignment to some particular person, it is to be understood of an immediate assignment to that person; for if the assignment is made to some third person, who subsequently assigns to the prohibited individual, there is no breach of the covenant;<sup>6</sup> unless the assignment had been made to such third person with the intent, and for the purpose, of his assigning it over.<sup>7</sup> But if it be covenanted “that in case the lessee should suffer or permit more than

<sup>1</sup> Doe v. Bevan, 3 M. & S. 353. So a bond to convey does not constitute an assignment. Mayhew v. Hardesty, 8 Md. 479.

<sup>2</sup> Doe v. Hogg, 4 D. & R. 226. And in Trimm v. Marsh, 54 N. Y. 599; Riggs v. Russell, 66 id. 193, a mortgage of a lease was held no breach of this covenant, as a mortgage was a mere security, and no transfer of title.

<sup>3</sup> Gourlay v. Somerset, 1 Ves. & B. 73.

<sup>4</sup> Lloyd v. Crispe, 5 Taunt. 249; Roe v. Harrison, 2 T. R. 425. So Wollaston v. Hakewell, 3 Scott, N. R. 593; Paull v. Simpson, 9 Q. B. 365.

<sup>5</sup> Jackson v. Brownson, 7 Johns. 227.

<sup>6</sup> Dyer, 45, a. A covenant that the lessee, his executors or administrators, will not assign, does not bind his assignees. Doe v. Smith, 5 Taunt. 795; 1 Marsh. 359; 2 Rose, 280.

<sup>7</sup> Co. Lit. 223, b.

one person to every hundred acres, to reside on, use, or occupy any part of the premises, the lease should be void," and the lessee lets part of the premises to persons for a year, to cultivate on shares, in the proportion of more than one to each hundred acres, it is a breach of the condition, and defeats the lease.<sup>1</sup> Sometimes this covenant is qualified by a clause that consent is not to be arbitrarily withheld; and in such case an unfair and unreasonable refusal of permission would leave the lessee at liberty to assign without the lessor's consent.<sup>2</sup>

§ 408. **Assignment by Operation of Law not a Breach.** — An assignment, either by the lessee or his executor, which is not voluntary, but done by operation of law, is not a breach of the covenant not to assign.<sup>3</sup> Therefore, where a lessee who had so covenanted gave a warrant of attorney to confess a judgment on which the lease was taken in execution and sold, it was considered to be no breach of the covenant.<sup>4</sup> But such an execution must be *bond fide*; for if the tenant shall give a warrant of attorney to a creditor for the purpose of enabling the creditor to take the lease in execution, this would be a fraud and a breach of the covenant; and if the lease should be sold under such an arrangement, the lessor may recover the premises from a purchaser at the sheriff's sale.<sup>5</sup> And if the lessee makes a general assignment for

<sup>1</sup> Jackson v. Brownell, 1 Johns. 267; Same v. Rich, 7 id. 194.

<sup>2</sup> Treloar v. Bigge, L. R. 9 Exch. 151. A refusal upon advice, though the grounds of refusal are not specified, does not seem to be arbitrary. *Id.* The lessee cannot have an equitable remedy to compel the lessor to consent, since the proviso merely qualifies the lessee's covenant, and does not amount to a contract on the lessor's part. Sear v. House &c. Soc. 10 Ch. D. 387.

<sup>3</sup> Wilkinson v. Wilkinson, Coop. Eq. 259; Weatherall v. Geering, 12 Ves. 513; Stevenson v. Silvernail, 15 Johns. 278; Jackson v. Corliss, 7 id. 531; Smith v. Putnam, 3 Pick. 221. Thus, where in insolvency. Bemis v. Wilder, 100 Mass. 446. So where a lessee conveyed to a railway company, who had taken the land by right of eminent domain. Baily v. De Crespigny, 10 B. & S. 1.

<sup>4</sup> Philpot v. Hoare, 2 Atk. 219; Doe v. Carter, 8 T. R. 57; Doe v. Bevan, 3 M. & S. 358; and see Riggs v. Pinsell, 66 N. Y. 193.

<sup>5</sup> Doe v. Carter, *supra*.

the benefit of creditors, by the order of a court of law, or judge, it will be valid, and his assignees will not be bound by this covenant, but may dispose of it as they please.<sup>1</sup> It would seem, also, that the devise of a term by the lessee is not a breach of the covenant not to assign;<sup>2</sup> although the earlier cases held the contrary.<sup>3</sup> So if a single woman, to whom a lease has been granted with a condition against alienation, take a husband, it is no breach of the condition; because it is the act of the law which gives the lease to her husband.<sup>4</sup> Yet, if a lease be made to a husband and wife, upon condition that, if it come to any other hand than their own, or that of their issue, the lessor shall re-enter, and afterwards the husband die, and the wife takes another husband, the lessor will have a right to re-enter.<sup>5</sup> And if the covenant is merely personal, having no reference to assigns, — as, that the lessee shall not sell without leave, — his executors, not being named, may sell without incurring a breach.<sup>6</sup>

§ 409. **But, by Stipulation, may be ground of Forfeiture.** — The landlord may, however, guard against such operations of law by the terms of his contract, stipulating that the lease shall not pass by operation of law, and may thus render even an involuntary assignment of the lease a forfeiture.<sup>7</sup> As where one leased a farm for twenty-one years, if the lessee and his executors should so *long continue to occupy it*,

<sup>1</sup> *Goring v. Warner*, 2 Eq. Ca. Abr. 100; *Shee v. Hale*, 13 Ves. 404; *Doe v. Bevan*, *supra*; *Doe v. Powell*, 5 B. & C. 308. But in *Spencer v. Darlington*, 74 Pa. St. 286, it was held that a receiver could not.

<sup>2</sup> *Crusoe v. Bugby*, 3 Wils. 237; *Doe v. Bevan*, *supra*. Executors may dispose of a term for years, as assets, notwithstanding a proviso or covenant that the lessee shall not assign. *Seers v. Hind*, 1 Ves. 295.

<sup>3</sup> *Dyer*, 45, b; *Knight v. Mory*, Cro. El. 60; *Barry v. Stanton*, *id.* 330; *Dumper v. Syms*, *id.* 815.

<sup>4</sup> *Moore*, 21. So where the condition in a lease to a single woman was that the lease was “only for herself,” it was held not broken by her marrying a widower with four children, who occupied the premises. *Schroeder v. King*, 38 Conn. 78.

<sup>5</sup> Com. Dig. (Condition) Q.

<sup>6</sup> 4 Kent, Com. 130.

<sup>7</sup> *Roe v. Galliers*, 2 T. R. 133; *Davis v. Eyton*, 7 Bing. 154; *Doe v. Hawke*, 2 East, 481; *Cooper v. Wyatt*, 5 Madd. 482; *Yarnold v. Moorhouse*, 1 Russ. & M. 364.

stipulating that he should not let, assign, or otherwise part with the lease; and the tenant, having become bankrupt, made an assignment, and his assignees sold the lease, it was held that the landlord had a right to enter when the insolvent quit the occupation of the premises.<sup>1</sup> And wherever the tenant holds his estate under an express condition to keep it in his own possession, with a proviso that it shall cease upon its being taken in execution, the estate will terminate upon the premises being taken under execution, if it puts an end to his occupation.<sup>2</sup>

§ 410. **Covenant discharged by License from Landlord.**—When a license has once been given, the condition is thereby wholly discharged, and no forfeiture is incurred by any subsequent alienation; for a proviso, or condition, cannot be divided or apportioned by act of the parties.<sup>3</sup> Or if the lease be made to three, with a condition that neither they nor any of them shall alien without license, and then the lessor licenses

<sup>1</sup> Doe v. Clarke, 8 East, 185.

<sup>2</sup> Doe v. Hawke, *supra*.

<sup>3</sup> See *ante*, § 286, and notes. It is sometimes said that the covenant is discharged. Jones v. Jones, 12 Ves. 186; Doe v. Pritchard, 5 B. & Ad. 781; per Patteson, J. But this seems an error. Where there is a mere condition and no covenant, a license discharges all restriction; but if there is a covenant with a proviso of forfeiture superadded, the latter only is discharged. In Dumpor's Case there was a bare condition, and no covenant. The two cases *supra* merely attempted to state that case. Besides, both were *dicta*, and in the former case the covenant was against underletting, not against assigning. All the other cases limit the discharge to the condition. Thus, in Macher v. Foundl. Hosp., 1 Ves. & B. 191, Ld. Eldon says, "the condition is gone." In Brummell v. Macpherson, 14 Ves. 175, there was a bare condition and no covenant. In Dakin v. Williams, 17 Wend. 458, and Gannett v. Albree, 108 Mass. 374, the court say the principle of discharge by license does not apply to covenants; and in Dickey v. McCulloch, 2 W. & S. 100, it was held that the condition was discharged, but an action still lay on the covenant, as a contract. The reason of this will appear on referring to the leading case, which went on the insusceptibility of a condition to be apportioned; while a covenant may always be. If, therefore, there is not a mere condition, but a covenant coupled with a condition, while the lessee and his assignee are relieved of forfeiture, they may still be held liable for breach of the covenant, if made in proper terms to run. Paul v. Nurse, 8 B. & C. 486; Williams v. Earle, 9 B. & S. 740; West v. Dobb, *id.* 755.

one, this discharges the condition as to all.<sup>1</sup> And whether the license be general or given to one person in particular, it does not vary the principle; for the condition being once dispensed with, it is wholly discharged; the provision for making void the lease must exist entire, or not at all, and any subsequent assignee may alien without license.<sup>2</sup> And if the license extends to but part only of the premises, the lessee may afterwards alien the residue without further license.<sup>3</sup> But this general rule of law may be restrained by the express contract of the parties (as is the case with many leases granted in the city of New York) that permission to assign the lease once given shall not operate so as to authorize any subsequent assignment, but that for each of such assignments express permission shall be necessary; the object of which appears to be, to require each new party to the assignment to enter into a fresh covenant with the lessor to pay rent, by which means he gets an additional surety for rent upon every fresh license given.

§ 411. **Effect of Acceptance of Rent after Breach.**—The acceptance of rent by a landlord, after the breach of a condition not to assign, is tantamount to a license;<sup>4</sup> but it is otherwise with regard to a condition not to underlet, for in this case any subsequent underletting will authorize the landlord to re-enter.<sup>5</sup> But in order to put an end to the condition, the license must be of such a character as is therein contemplated.<sup>6</sup> Or, if the condition be not a general restraint of alienation, but permits the lessee to assign in a particular way, as, for instance, by will, an assignee to whom the lease

<sup>1</sup> *Leeds v. Compton*, 1 Roll. Abr. 472.

<sup>2</sup> *Brummell v. Macpherson*, 14 Ves. 173.

<sup>3</sup> *Leeds v. Compton*, *supra*. A parol license to let part of the premises does not discharge the lessee from the restriction as to the other parts. *Roe v. Harrison*, *supra*.

<sup>4</sup> *Lloyd v. Crispe*, 5 Taunt. 249, 254–257; *Murray v. Murray*, 56 N. Y. 337; *Chipman v. Emeric*, 5 Cal. 49; *Clifford v. Reilly, Jr.* R. 4 C. L. 218; *Butler v. Smith*, 16 Ir. C. L. 213; *Smith, Land. & T.* 119; *post*, § 501.

<sup>5</sup> *Newman v. Rutter*. 8 Watts, 55; *Bleecker v. Smith*, 13 Wend. 534; *Doe v. Bliss*, 4 Taunt. 735; *Seaver v. Coburn*, 10 Cush. 324.

<sup>6</sup> See *ante*, § 287, and note.



has been assigned in the permitted way cannot assign it in any other.<sup>1</sup> It was at one time held that, where there was a right of re-entry upon an assignment or underletting, and a person should be found upon the premises acting as tenant, it was *prima facie* evidence of an underletting; and the defendant was bound to show whether the person was a tenant or merely a servant.<sup>2</sup> But Lord Ellenborough subsequently laid down a rule, which has been followed to this day, that it is not sufficient for this purpose to prove that the defendant, a stranger, was in possession of the demised premises, with his declaration that they were demised to him by another stranger, even if the tenant had covenanted not to part with the possession.<sup>3</sup>

§ 412. **Waiver of Breach of Condition.** — As has been already stated, a breach of condition producing a forfeiture may be waived, whether the lease was declared to be *ipso facto* void or was voidable only by re-entry.<sup>4</sup> And not only the receipt of rent, but other acts of waiver, will save the forfeiture.<sup>5</sup> Thus, where, in an action of ejectment for the breach of a condition that a lessee should not underlet, contained in an agreement of lease, it appeared in evidence that the lessor of the plaintiff asked the defendant what he would take for his land, and on the defendant naming a price, said, "Then let it, and I shall know what it will produce next year," — it was held that this was a waiver of the forfeiture on a breach of such condition.<sup>6</sup>

§ 413. **Landlord and Lessee's Assignee.** — Equity will not relieve against Forfeiture. — Where this covenant has been once

<sup>1</sup> Lloyd v. Crispe, 5 Taunt. 249. And the waiver need not be for a consideration. Stevens v. Taylor, 58 Iowa, 664.

<sup>2</sup> Doe v. Rickaby, 5 Esp. 4.

<sup>3</sup> Doe v. Payne, 1 Stark. 86.

<sup>4</sup> See *ante*, § 288; *post*, § 492, and notes.

<sup>5</sup> Clark v. Jones, 1 Den. 516; O'Keefe v. Kennedy, 3 Cush. 325; Porter v. Merrill, 124 Mass. 534; Roe v. Harrison, 2 T. R. 425; Mulcarry v. Eyres, Cro. Car. 511; Arnsby v. Woodward, 6 B. & C. 519; McKildoe v. Darracott, 13 Gratt. 278.

<sup>6</sup> Doe v. Watt, 8 B. & C. 308.

broken by an assignment, the lessor's right of action for a breach is not affected by his accepting an assignment of the lease from an assignee of the lessee.<sup>1</sup> And the assignee is not liable for any breach of a covenant made by the assignor, when the lease has been assigned to him by the consent of the lessor.<sup>2</sup> It was once thought that this covenant did not run with the land;<sup>3</sup> but this notion, which did not distinguish between the covenant and condition, has since been exploded.<sup>4</sup> A court of equity will not, in general, relieve against a forfeiture incurred by an alienation without license.<sup>5</sup> And in order that an assignment shall have the effect of inducing a forfeiture, the instrument must be valid and effectual in point of law; accordingly, where there was a proviso in a lease for re-entry in case of an assignment without license, and the lessee by deed assigned all his property, real and personal, to trustees for the benefit of his creditors, and was afterwards declared a bankrupt, — it was held, in England, that the deed of assignment, being an act of bankruptcy and therefore void, did not operate as a valid conveyance of the lessee's interest under the lease, and did not, therefore, work a forfeiture.<sup>6</sup>

<sup>1</sup> *Hazlehurst v. Kenrick*, 6 S. & R. 446. But an assignment by the lessee's assignee back to the lessee is not a breach of the covenant, since by the terms of the lease the lessor accepts the lessee as a tenant. *McCormick v. Stowell*, 138 Mass. 431.

<sup>2</sup> *Townsend v. Scholey*, 39 Cal. 18. The assignees of a lease are not liable to the lessor for rent accruing to him under a verbal promise from the assignor. *Coit v. Braunsdorf*, 2 Sweeny, 74.

<sup>3</sup> *Bally v. Wells*, 3 Wils. 33; *Doe v. Smith*, 5 Taunt. 795; and see, per Shee, J., *Elliot v. Johnson*, 8 B. & S. 38.

<sup>4</sup> *Weatherall v. Geering*, 12 Ves. 511; *Paul v. Nurse*, 8 B. & C. 486; *Williams v. Earle*, 9 B. & S. 740. A covenant, however, for one and his executors, will not bind his assigns. *Doe v. Smith*, and other cases, *supra*.

<sup>5</sup> *Hill v. Barclay*, 18 Ves. 56; *Wafer v. Mocato*, 9 Mod. 112.

<sup>6</sup> *Doe v. Powell*, 5 B. & C. 308.

## SECTION VI.

## THE COVENANT TO RESIDE ON THE PREMISES.

§ 414. **How broken. — Runs with the Land. —** The lessee sometimes binds himself and his assigns to reside upon the premises, — that is, to make them his fixed habitation, the place where his political rights are to be exercised, and where he is liable to taxation. This covenant, if not unreasonable, will be enforced, and is held to be broken, not only by the tenant's abandoning the premises, personally, but by his doing any act whereby his residence may become impossible; as, by suffering the premises to be taken and sold under an execution, having first confessed the judgment upon which the execution issued.<sup>1</sup> And a lease made on condition that the tenant should actually occupy during the term is determined by his assignees taking possession of the premises on his bankruptcy,<sup>2</sup> although such a covenant will not be broken by the occupancy of an agent of the covenantor.<sup>3</sup> This is a covenant running with the land, and will bind an assignee of the lease, although the executors and administrators only were named.<sup>4</sup>

<sup>1</sup> *Doe v. Hawke*, 2 East, 481; *Tatem v. Chaplin*, 2 H. Bl. 133.

<sup>2</sup> *Doe v. Clarke*, 8 East, 185. This is not the case of a forfeiture, but actual occupation was a condition of the lease; and it was considered by Lord Ellenborough, in *Doe v. Carter*, 8 T. R. 57, 300, that such a condition would be good to determine the lease in case of bankruptcy. But a covenant that the lessee is to occupy personally is satisfied if he occupies by an agent. *Clark v. Clark*, 49 Cal. 586. And where the agreement was for the lessee to "occupy only for herself," it was held no breach that she married a widower with four children, and lived with them on the premises. *Schroeder v. King*, 38 Conn. 78.

<sup>3</sup> *Clark v. Clark*, *supra*.

<sup>4</sup> *Spencer's Case*, 5 Co. 16, a; *Tatem v. Chaplin*, *supra*.

## SECTION VII.

## THE COVENANT TO BUILD AFTER A PRESCRIBED PATTERN.

§ 415. **When enforced in Equity. — Remedy at Law for Breach of.** — Although a court of equity will not, in general, decree the specific performance of a covenant, but will usually remit the party to his action of damages for a breach thereof, yet a covenant that the lessee will build a house on the demised premises, to correspond with the adjoining houses already built, as to its elevation or otherwise, is one which will be enforced in that court.<sup>1</sup> But where a landlord has dispensed with a covenant of this description in favor of one tenant, which was entered into for the benefit of all, such as to build in uniformity, or of a certain elevation, although the lessor may claim damages at law, he cannot have relief by injunction to restrain others, to whom he has not given such license, from infringing the covenant; for if he thinks it right to take away the benefit of his general plan from some of his tenants, he cannot, with any justice, come into a court of equity for an injunction against others; because they are deprived of the right which he had given them to have the general plan enforced for the benefit of all.<sup>2</sup> If land is let to a man, on which he agrees to erect certain buildings, within a certain time, with a power of re-entry to the lessor in case he fails to do so, but no lease is to be granted until the buildings are completed; the landlord may re-enter, or maintain ejectment, if the buildings are not erected within the time limited.<sup>3</sup> If a

<sup>1</sup> *Franklyn v. Tuton*, 5 Mod. 469. And see *Mosely v. Virgin*, 3 Ves. 184. A breach of a covenant to make a roadway in front of a particular house is not to be relieved against in equity, because, if made before the roadway in front of adjacent houses is made, it would be continually cut up and useless. *Nokes v. Gibbon*, 3 Drew. 681.

<sup>2</sup> *Roper v. Williams*, Turn. & R. 18.

<sup>3</sup> *Oldershaw v. Holt*, 12 Ad. & E. 590; *Doe v. Ekins*, Ry. & M. 29; *Doe v. Birch*, 1 M. & W. 402. But if the lessee agrees to pull down the old house and rebuild a new one, he is not obliged, in the absence of an express stipulation to that effect, to erect the new house in the same

lessee agrees to erect a valuable building upon the premises, and at the expiration of the term to surrender them in as good condition as reasonable use and wear will permit, damages by the elements excepted, and with no reservation of a right to remove the building referred to, such building belongs to the lessor at the end of the term.<sup>1</sup>

## SECTION VIII.

### THE COVENANT AGAINST CARRYING ON PARTICULAR TRADES.

§ 416. **May be enforced in Equity.—Run with the Land.—** Another covenant not infrequently inserted in a lease, on the part of a lessee, relates to his mode of occupation, — as, that he will not carry on particular trades upon the premises, nor assign to persons who carry on such trades; or that he will not carry on any business there which will be offensive to the neighborhood.<sup>2</sup> Sometimes the covenant goes further, and

manner and in the same style and shape, or with the same elevation as the old building. *Low v. Innes*, 4 De G. J. & S. 286. A covenant that private houses only, of a certain minimum value, are to be built on certain plots of land, is not broken by the erection on one of them of a stable with a bedroom over it, of such dimensions and in such a position that it would still be possible to build a house of the stipulated value upon the plot. *Russell v. Baber*, 18 W. R. 1021, V. C. Bacon.

<sup>1</sup> *Mayor v. Hamilton F. I. Co.*, 10 Bosw. 537; *Mayor v. Brooklyn F. I. Co.*, 41 Barb. 231. If no time is specified in the lease for the erection of the building, tenant may erect it at any time during the term; but his declaration that he would not make the improvement at all, is no breach of his agreement. *Palethorp v. Bergner*, 52 Pa. St. 149. It is held in Pennsylvania that where a tenant contracts with his landlord to build or to repair buildings, for a compensation to be made him by the landlord, either in money or in the use and occupation of the buildings, the tenant is, in respect of such repairs, the landlord's agent; and so the building will be liable for a lien by the mechanic making such repairs. *Hall v. Parker*, 94 Pa. St. 109; *Wainwright v. Barclay*, 12 Phila. 221; *Barclay v. Wainwright*, 86 Pa. St. 191; *Boteler v. Espen*, 99 *id.* 313; *Long v. McLaughlin*, 103 *id.* 537.

<sup>2</sup> An under-tenant may pursue any lawful business on the premises which is not prohibited by the lease to his lessor or himself, and which is not injurious to the premises. *Taylor v. Moffat*, 23 Ind. 304.

totally prohibits the carrying on of any trade or business whatever. This precaution often becomes necessary, particularly in town leases, not merely for the protection of the premises from injuries which might otherwise be done to them, but to prevent their respectability being lessened, and their good-will thereby diminished. A court of equity will enforce this covenant, and, by injunction, either regulate or restrain the lessee's occupation of the premises, as circumstances may require.<sup>1</sup> Covenants of this kind, as they affect the mode of occupation or enjoyment, run with the land; and the assignee, though not named, will be liable to an action for damages, or to a forfeiture on the condition of re-entry, if he uses the property in contravention of such an agreement.<sup>2</sup>

§ 417. **For Total Restraint of Trade, against Public Policy. — For Limited Restraint, when valid. —** The general doctrine with regard to covenants in restraint of trade is, that all contracts which totally restrain trade, — as, that a man will not pursue his occupation or carry on business anywhere in the State, — are contrary to sound policy, and void, upon whatever consideration they may be made. For such contracts are injurious to the public, and no good reason can be shown why one individual should thus fetter himself, or why another should contract for the restraint; they are injurious to one party, without

<sup>1</sup> *Howard v. Ellis*, 4 Sandf. 369. Where the parties by an express stipulation have determined that a particular trade or business, conducted by one, will be injurious or offensive to the other, and there is a continuing breach of the stipulation by the one, which the court can perceive may be highly detrimental to the other, although it is not clear that it produces a serious injury, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages, — it is the duty of a court of equity to restrain further infractions of the covenant. Per Sandford, V. C., in *Steward v. Winters*, 4 Sandf. Ch. 587; *Dodge v. Lambert*, 2 Bosw. 570; *Stees v. Kranz*, 32 Minn. 813.

<sup>2</sup> *Mayor v. Pattison*, 10 East, 136; *Brouwer v. Jones*, 23 Barb. 158. A recital in a lease, of the purposes for which demised premises are let, for example, describing them as now occupied as a timber-yard, and to be occupied as a timber-yard, constitutes an express covenant on the part of the tenant to use them for no other purpose, and is a covenant running with the land, binding on the assignee. *Deforest v. Byrne*, 1 Hilt. 43.

being beneficial to the other.<sup>1</sup> But there may be good reasons for allowing parties to contract for a limited restraint, and such contracts, if made on a sufficient and reasonable consideration, are valid ; yet, even then, the law presumes them to be bad, until the circumstances inducing the arrangement are shown to the court to be reasonable and useful.<sup>2</sup> This rule applies with great propriety in favor of a landlord whose premises may be injured, and his general interests made to suffer, by the carrying on of many trades and operations upon them. And for this reason a contract not to exercise a trade or carry on business in a particular place, or with a particular person, will be upheld and enforced. As, if a lessee covenants that he will not underlet the shop, yard, or other thing belonging to the house, to any one who shall sell coals, and will not himself sell coals there, and then lets the whole house to one who sells coals, there is a clear breach of the covenant.<sup>3</sup> And where a lessee covenanted not to use, exercise, or suffer, or permit another to use, or exercise any trade or business whatever, upon the leased premises, and then assigned his lease to a schoolmaster, who carried on his busi-

<sup>1</sup> *Ross v. Sadgbeer*, 21 Wend. 166; *Saratoga Co. Bk. v. King*, 44 N. Y. 87.

<sup>2</sup> *Chappel v. Brockway*, 21 Wend. 157; *Pierce v. Fuller*, 8 Mass. 223; *Nobles v. Bates*, 7 Cow. 307; *Horner v. Graves*, 7 Bing. 735; *Palmer v. Stebbins*, 3 Pick. 188; *Mitchell v. Reynolds*, 1 P. Wms. 181; *Archer v. Marsh*, 6 Ad. & E. 959; *Pike v. Thomas*, 4 Bibb, 486. The inquiries to be made to determine the validity of a contract in restraint of trade are: 1. Whether it is a partial restraint. 2. Is it upon an adequate consideration? 3. Is it reasonable? *Holbrook v. Waters*, 9 How. Pr. R. 335. Although public policy requires that every man shall be at liberty to work for himself, and shall not deprive himself, or the State, of his labor, skill, or talent, it is equally a principle of public policy that a man shall be enabled to sell to the best advantage anything that he has acquired by his labor, skill, or talent; and when that advantage requires him to enter into stipulations he may do so, provided such stipulations, however restrictive on himself, are not unreasonable, having regard to the subject-matter of the contract. Per V. C. James, *Leather Cl. Co. v. Lorsant*, L. R. 9 Eq. 345.

<sup>3</sup> *Chinsley v. Langley*, 1 Roll. Abr. 427, l. 35; *Doe v. Bird*, 2 Ad. & E. 161. And see *Pierce v. Fuller*, *supra*. So of a covenant that no ardent spirits shall be sold on the premises. *Hatcher v. Andrews*, 5 Bush, 561.



ness on the premises, the schoolmaster's business was held to be a breach of the covenant.<sup>1</sup>

§ 418. **Never to be Implied.** — But no covenant in a lease, in restraint of a beneficial use of the property, will be implied in any case where none is expressed.<sup>2</sup> Thus a covenant not to use the premises for any other purpose will not be inferred from the words "to be used as cabinet warerooms."<sup>3</sup> And in a case where the lessee covenanted that he would not do any act upon the premises which might be to the damage, annoyance, or disturbance of the lessor, or of any of his tenants, or to the neighborhood, and that he would not permit any person to inhabit the premises who should carry on certain specified trades or business (that of a licensed victualler not being one of them), or any other business that might be offensive, or an annoyance, or disturbance to any of the lessor's tenants, — the court held that the opening of a public-house on the premises was no breach of the covenant, as it did not appear that such public-house was an annoyance to the tenants, or was likely to become so.<sup>4</sup> So a covenant not to carry on the business of a

<sup>1</sup> *Doe v. Keeling*, 1 M. & S. 95; *Doe v. Spry*, 1 B. & A. 617. So, of a covenant by the lessor of a brewery that he will not, during the continuance of the lease, carry on the business of a brewer or merchant or agent for the sale of ale, in S., or elsewhere, or, in any other manner howsoever, be concerned in said business. *Hinde v. Gray*, 1 M. & G. 195. A provision that the premises should be used strictly as a private dwelling, and not for any public or objectionable purpose, was held to be violated by their use as a boarding-house, although the lessor had consented to their use for sleeping-rooms in connection with a girls' school. *Gannett v. Albree*, 103 Mass. 372. And where a lease contained a covenant that a house to be built immediately adjoining the house in which the lessor lived should be built fit for a private family, it was held to be a continuing covenant, obliging the lessee as well to keep as to build the house as a private dwelling-house, and was broken by his converting it into a public-house. *Bray v. Fogarty*, 4 Ir. R. Eq. 544.

<sup>2</sup> But see, *contra*, *Reed v. Lewis*, 74 Ind. 433. It seems that either party may make a valid contemporaneous parol agreement, in consideration of the lease, not to engage in a rival business. *Welz v. Rhodius*, 87 *id.* 1.

<sup>3</sup> *Brugman v. Noyes*, 6 Wisc. 1. But *Deforest v. Byrne*, 1 Hilt. 43, is *contra*.

<sup>4</sup> *Jones v. Thorne*, 1 B. & C. 715.

common brewer, or retailer of beer, is not broken by carrying on the business of a retail brewer.<sup>1</sup> But a covenant not to carry on the trade of a butcher is broken by selling raw meat, although no animals are slaughtered on the premises.<sup>2</sup> And a covenant to occupy as a jobber of goods is broken by occupying as an auctioneer.<sup>3</sup>

<sup>1</sup> *Simons v. Farren*, 1 Bing. (N. C.) 126. So an agreement not to carry on trade in his own name, or in that of any other person in a particular town. Managing the business of another person in the same trade at a weekly salary is no breach. *Allen v. Taylor*, 24 L. T. N. S. 249. But a covenant by a clerk and traveller with a firm of brewers that he would not, during his service or within two years after, either directly or indirectly, sell, procure orders for, or recommend, or be in any wise concerned or engaged in the sale or recommendation, either on his own account, or for any other person or company, of any Burton ale or porter brewed at Burton, or offered for sale as such, other than the ale, beer, or porter brewed by the firm, was held to be void, as unnecessarily extensive and severe. *Allsop v. Wheatcroft*, L. R. 15 Eq. 59. Per Wickens, V. C.

<sup>2</sup> *Doe v. Spry*, 1 B. & A. 617. In construing a covenant not to carry on an offensive business, much will depend on the situation of the premises, and its relation to other buildings. *Gutteridge v. Munyard*, 7 C. & P. 129; *Seymour v. McDonald*, 4 Sandf. Ch. 502. Using a house as a private lunatic asylum was held to be *per se* no breach. *Doe v. Bird*, 2 Ad. & E. 161.

<sup>3</sup> *Steward v. Winters*, 4 Sandf. Ch. 587. It is no defence to an action to restrain the lessees from using the premises in a way which they covenanted not to do, that the use is not a public or a private nuisance; nor that it will not deteriorate the premises in value; nor that the lessees have expended large sums with a view to such prohibited use, which they will lose if not permitted to violate their covenant. *Dodge v. Lambert*, 2 Bosw. 570; *Howard v. Ellis*, 4 Sandf. 369. In numerous cases recovery at law or relief in equity has been given in like manner where the grantor has conveyed to different individuals adjoining lots, and the deeds contained a covenant or agreement restricting the use of the property to a dwelling-house, or prohibiting any trade or business which might be offensive to the neighboring inhabitants. In all such cases the court of equity has held that such covenant was for the mutual benefit and protection of all the purchasers; and although a previous purchaser from the original proprietor could not sue thereon at law, yet that a court of equity might protect him, by injunction, against the carrying on of any noxious business or trade upon the lot of such subsequent purchaser. *Barrow v. Richard*, 8 Paige, 351; *Parker v. Nightingale*, 6 Allen, 841; *Dorr v. Hanrahan*, 101 Mass. 531. As to keeping a lunatic asylum, see *Doe v. Bird*, 2 Ad. & E. 161. And as to preventing a nuisance by injunction, see *ante*, § 208, note. An injunction will not be granted to restrain a breach of covenant not to carry on a certain business, under penalty of liquidated damages,

§ 419. **Different Covenants construed.**—If a tenant covenants not to carry on a particular trade without the written consent of the lessor, the mere fact of the lessor's suffering the tenant to carry on one trade on the premises will not afterwards authorize his carrying on the other, without a written license.<sup>1</sup> Where the engagement is not to trade within a given distance in a town, such distance is to be measured by the shortest way of access by the ordinary foot-path. Thus, where the assignee of the lease of a public-house in London covenanted that he would not keep a public-house within the distance of half a mile from the premises assigned, it was held that the half-mile mentioned in the covenant imported half a mile measured, not in a direct line, but by the nearest way of access between the premises assigned and any public-house afterwards kept by the assignee.<sup>2</sup> If a lessee exercises a trade upon the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by and witnessing the act for six years, waive the forfeiture, since some positive act of waiver is necessary to produce that result; but if he permit the tenant to expend money in improvements, which are necessary to adapt them to that trade, it would seem to be evidence to be left to the jury of his consent to their being so occupied.<sup>3</sup>

although the defendant was insolvent; for plaintiff has a legal remedy. *Vincent v. King*, 13 How. Pr. R. 234.

<sup>1</sup> *Macher v. The Foundling Hospital*, 1 Ves. & B. 188. A covenant that the covenantor will not carry on a certain business, in his own name or that of any other person, is not violated by his acting as manager, at a weekly salary, to another person carrying on the same business. *Allen v. Taylor*, 19 W. R. 888. But an agreement not to carry on a particular business, directly or indirectly, either alone or in partnership with, or with the assistance of, any other person, is broken by his carrying it on as manager to another person. *Dales v. Weber*, *id.* 993.

<sup>2</sup> *Leigh v. Hind*, 9 B. & C. 774. The converse of this proposition seems to have been subsequently held in *Moufflet v. Cole*, 42 L. T. Exch. 8. In a lease of a coal-mine, the lessee stipulated that he would pay rent for coal taken out, and also mine a certain number of tons annually; and it was held that settlements for coal taken out, were not as matter of law, a discharge of a breach in not taking out the stipulated quantity. *Powell v. Burroughs*, 54 Pa. St. 329.

<sup>3</sup> *Doe v. Allen*, 3 Taunt. 71. Premises occupied as a manufactory of

## SECTION IX.

## THE COVENANT FOR PARTICULAR MODES OF CULTIVATION.

§ 420. **Different Forms of. — Implied from Custom.**—In farming leases, there are usually covenants as to the manner in which the farm is to be managed, the course of cropping, the expenditure upon the farm of the manure to be made upon it, and the like. These, of course, differ in different sections of the country, according to the course of husbandry adopted in each section. Sometimes they are intended to enforce the custom of the country, in reference to what may be considered good husbandry ; at other times, to vary from it ; and, in this latter case, the covenant will, of course, exclude and supersede the custom. And where a tenant held the premises under the terms of an expired lease, by which it was stipulated that the tenant, on quitting the farm, should not sell or take away any of the manure in the fold, but should leave it to be expended by the landlord or his succeeding tenant, and the lease contained no stipulation as to the tenant being entitled to payment for such manure, but by the custom of the country, although the tenant would have been bound to leave the manure in like manner, yet he would be entitled to payment for it, — it was held that, as an express stipulation had been made upon the subject, the custom was thereby excluded, and that the tenant was not entitled to be paid for the manure.<sup>1</sup> But as far as the custom is not inconsistent with the express

carpet-bags, were leased to be occupied for the *same purpose they now are*. The tenant used them as a manufactory of caps, and it was held not so material an alteration as of itself to determine the lease. *Shumway v. Collins*, 6 Gray, 227. A covenant to use the premises only for the regular dry-goods jobbing business, is violated by selling at auction. *Steward v. Winters*, 4 Sandf. Ch. 587. The payment of money is not necessary to constitute a “business” under a covenant not to carry on any trade or business. *Rolls v. Miller*, 27 Ch. D. 71. So a “Home for Working Girls” maintained on the premises was held to be a business. *Id.* So a hospital. *Portman v. Home Hospital Ass’n*, *id.* 81, n.

<sup>1</sup> *Roberts v. Barker*, 1 Cr. & M. 808.

stipulations of the lease, it is deemed to be impliedly grafted upon it, and to form part of the contract between the parties.<sup>1</sup>

§ 421. **To manage Farm in a Husbandlike manner, Implied.** — Independently, however, of express covenants for proper cultivation on the part of a tenant, it is held that the mere relation of landlord and tenant is a sufficient consideration to raise an implied promise by the tenant to manage the farm in a husbandlike manner, and in conformity to the custom of the neighborhood.<sup>2</sup> And even where a tenant occupies under an agreement which does not amount to a lease, he is liable, upon the same principle, to an action for mismanaging the farm.<sup>3</sup> But this obligation extends only to a reasonable and usual mode of culture, and does not bind the tenant to any extraordinary course of cultivation.<sup>4</sup>

§ 422. **When Equity will Enforce.** — The common covenants in husbandry are not, from their nature, generally the subject of an equitable jurisdiction, for which a specific performance can be decreed.<sup>5</sup> Nor will the court investigate the proper mode of cultivating a farm; and the implied terms of an agricultural contract before stated are not more specific than a general covenant to keep in repair.<sup>6</sup> But an injunction has been granted to restrain a tenant from year to year, — who, it was said, was equally bound as a tenant for a longer period to manage his farm in a husbandlike manner, — from removing

<sup>1</sup> *Hutton v. Warren*, 1 M. & W. 466; *Hindle v. Pollett*, 6 *id.* 529.

<sup>2</sup> *Powley v. Walker*, 5 T. R. 373; *Horsefall v. Mather*, Holt, 7; *Buck v. Pike*, 27 Vt. 529. Where the lease was on shares and the tenant cultivated negligently, it was held that the landlord was entitled to such portion of his crop as his share would have amounted to had the tenant used proper diligence. *Wheat v. Watson*, 57 Ala. 581.

<sup>3</sup> *Tempest v. Rawling*, 13 East, 18. On this subject, see *The Tenant's Covenant to repair*, *ante*, § 344.

<sup>4</sup> *Lagh v. Hewitt*, 4 East, 154; *Webb v. Plummer*, 2 B. & A. 746. He cannot set up a claim for voluntarily farming land in a more beneficial manner than the lease required. *Bullitt v. Musgrave*, 3 Gill, 31. So, when the land is rented for a portion of the crop. *Patton v. Garrett*, 37 Ark. 605.

<sup>5</sup> *Rayner v. Stone*, 2 Eden, 123.

<sup>6</sup> *Dunn v. Bryan*, 7 Ir. R. Eq. 143.

crops, and manure, except according to the custom of the country.<sup>1</sup> In another case, where a tenant was enjoined from ploughing up pasture land, the lease contained no express covenant against converting pasture into arable land; but the landlord was, nevertheless, held to be entitled to the injunction, on the ground of there being an implied covenant to manage pasture in a husbandlike manner.<sup>2</sup> Upon the same principle, the court has interfered to restrain a tenant from sowing mustard, saffron, or other deleterious crops, when they were contrary to the usual course of husbandry.<sup>3</sup>

§ 423. **Legal and Equitable Remedies on.** — If a tenant covenants to leave stock of a certain amount upon the premises, and a fair ground of suspicion should arise that he does not mean to perform his covenant in that respect, although compensation in damages might be had for a breach, after the expiration of the term, yet as the agreement has relation to the mode of enjoyment for which the landlord has stipulated, a bill in the nature of a *quia timet* may be filed.<sup>4</sup> And where a man was let into possession of a farm and paid rent, under an agreement for a future lease for fourteen years, which was to contain a covenant (amongst others) against taking successive crops of corn from the land, and a proviso for re-entry upon the breach of any of the covenants, but the lease was not in fact executed, — the tenant having taken successive crops of corn from the farm, which would be a breach of the covenant if the lease had been executed, the lessor brought an

<sup>1</sup> *Onslow v. —*, 16 Ves. 173.

<sup>2</sup> *Drury v. Molins*, 6 Ves. 328. A lease contained covenants by the lessee to pay a specified increased rent for every acre which he should plough up over and above one third part of the demised premises; and also that, in case he should plough up one third or any other part of it, he should lay down the same with clover or grass seeds. The lessee ploughed up more than one third, paid the increased rent for it, and then laid it down in pasture. Held, that, upon the construction of both the covenants taken together, the increased rent ceased to accrue from the time that the ploughed land had been restored to pasture. *Domville v. Forde*, 7 Ir. R. L. 534.

<sup>3</sup> *Pratt v. Brett*, 2 Mod. 62.

<sup>4</sup> *Ward v. Buckingham*, 3 Bro. P. C. 581; *Briggs v. Oaks*, 26 Vt. 138; *Smith v. Niles*, 20 *id.* 315.

ejectment, and was allowed to recover.<sup>1</sup> For, until the lease was executed, the tenant, it was said, held as a yearly tenant, subject to the terms and conditions which, by the agreement, were to be embodied in the lease; and being guilty of a breach of one of them, the landlord had a right to re-enter.<sup>2</sup>

## SECTION X.

### THE COVENANT TO REDELIVER FIXTURES, ETC.

§ 424. **Affords Remedy for Injury or Removal of.** — Where fixtures, which are not part of the freehold, or furniture, or other goods or chattels, are leased with a house, it is usual to attach a schedule of them to the lease, and to insert a covenant on the part of the lessee to redeliver them in good condition at the end of the term. The object of this covenant, is to give the lessor a remedy at the end of the term, as well for the non-delivery of the things themselves as for any damage sustained by their being injured; for, as he cannot complain of an injury during the existence of the term, since they may be replaced before the end of it, and as the ordinary remedy by an action of trover or replevin merely affects the recovery of the chattels, he might be without remedy for damage done to them, without the insertion of such a covenant. The covenant sometimes includes an agreement to surrender all improvements that a lessee may put upon the premises during his term; and will then embrace every addi-

<sup>1</sup> But it is held that although performance of a tenant's covenant to keep down the briers, &c., in the fence-corners is not to be postponed until the end of the term, a breach will not enable the landlord to end the tenancy by a notice to quit. *Ricketts v. Richardson*, 85 Ind. 508.

<sup>2</sup> *Doe v. Amey*, 12 Ad. & E. 476. A lessee for years covenanted not to carry off hay from a farm, and a quantity of hay was attached by his creditors, and carried off by his consent; held, to be no breach of his covenant. *Smith v. Putnam*, 3 Pick. 221. But the lessor may, under these circumstances, have an action against the attaching creditor of the tenant, or one who purchases with notice of the landlord's right. *Leland v. Sprague*, 28 Vt. 746; *Baxter v. Bush*, 29 *id.* 465.



tion, alteration, erection, or annexation made by the lessee during the demised term, to render the premises more available and profitable, or useful and convenient. But as to chattels annexed to the premises, which are not fixtures, a tenant may be excused for non-performance by showing that they in fact belonged to another person, although found by him on the premises, and that they were taken from his possession by virtue of a chattel mortgage executed by the owner.<sup>1</sup>

## SECTION XI.

### THE COVENANT TO SECURE PAYMENT OF RENT AND THE PERFORMANCE OF AGREEMENTS.

§ 424 *a.* **Different forms of. — Landlord's Lien. — Statutory Liens.** — A tenant is sometimes required to give security for the payment of rent, and the performance of covenants embraced in the lease. The security may consist of a mortgage

<sup>1</sup> *Lawrence v. Kemp*, 1 Duer, 363; *Higgins v. Whitney*, 24 Wend. 379; *Perry v. Chandler*, 2 Cush. 237; *Kaley v. Shed*, 10 Met. 317; *French v. Mayor*, 16 How. Pr. R. 220. Where suit was brought on the covenant to redeliver premises, etc., for damages occasioned by the removal by the tenant of fixtures annexed to the freehold, it was held that the tenant was not aggrieved by a ruling that the measure of damages was the sum required to restore the fixtures, allowing for reasonable use and wear, and for the increase of value by substituting new material for old. *Watriss v. Bk. of Cambridge*, 130 Mass. 343. On a lease of land for a term of years, with a covenant by the lessee that if the lessor should be desirous during the term to take all or any part of the land for building thereon, it should be lawful for her to come into and enter upon all or any part, to make such buildings as she should think proper, and to do all necessary acts without interruption by the lessee, provided the lessor gave six months' notice of her intention, with a proviso also that the lease should be void for non-performance of covenants, — held, that the lessor, having agreed with a third person to the terms of a building contract, might give six months' notice of her intention to take the whole of the land for building, and, at the expiration of that time, and after refusal by the tenant to deliver up possession, might bring ejectment. *Doe v. Abel*, 2 M. & S. 541.

upon his goods and chattels, and may be contained either in the lease, or in a separate instrument,<sup>1</sup> or in the undertaking of a third person, conditioned to pay the rent of the premises in case of the tenant's failure to do so. Sometimes it is in the form of a stipulation in the lease that lessor shall have a lien for his rent on all personal property then on premises, such lien to be enforced in case of non-payment in the same manner as in cases of a chattel mortgage.<sup>2</sup> The undertaking may also be extended, so that the surety will become answerable for any damages which the landlord may sustain by the tenant's neglect to perform the various covenants entered into by him. All rules applicable to suretyship in general will apply to such an undertaking, — as, that it must be in writing and upon a good consideration.<sup>3</sup> It must be reasonably certain in its terms, and therefore a provision in a lease which

<sup>1</sup> *Brooker v. Jones*, 55 Ala. 266.

<sup>2</sup> *Van Heusen v. Radcliff*, 17 N. Y. 580; *McLean v. Klein*, 3 Dil. 113. So where a farm and stock were leased with a proviso that the stock and products of the farm were to be the property of the lessor until the lessee's obligations were fulfilled. *Griswold v. Cook*, 46 Conn. 198. It is held that an agreement that the crop shall be stored in the landlord's name as security for rental in money is not a chattel mortgage, but that the ownership of the crop remains in the landlord until the rent is paid. *Fox v. McKinney*, 9 Oregon, 495. Where the stipulation was for a lien upon the lessee's furniture, it was held that the landlord stood in the relation of pledgee rather than mortgagee; and so, while entitled to the possession of the furniture, was liable to account for the using of it. *State v. Adams*, 76 Mo. 605. But when the lien is to be enforced in the same manner as in the case of a chattel mortgage it is in effect a mortgage. *Reynolds v. Ellis*, 34 Hun, 47; and see *Thomas v. Bacon*, *id.* 88; *Wisner v. Ocumpaugh*, 71 N. Y. 113.

<sup>3</sup> And in England and certain of the United States the consideration must be expressed in the instrument of guaranty. *Wain v. Warlters*, 5 East, 10; *Sears v. Brink*, 3 Johns. 210; *Newcomb v. Clark*, 1 Den. 226. But though the agreement of the surety be dated after the lease, if it is expressed to be in consideration of the letting, it will, in the absence of other proof, be regarded as a contemporaneous promise subsequently reduced to writing. *Gottsberger v. Radway*, 2 Hilt. 342. If a surety signs the agreement of the principal, the expression of the consideration of the agreement contained therein is sufficient. *Clark v. Rawson*, 2 Den. 135. The words *for value received* is a sufficient expression of the consideration of a guaranty. *Watson v. McClure*, 19 Wend. 587.

stipulated that the lessor should have a lien by way of mortgage upon all goods or other personal property which may be put upon the demised property, was held to be void for uncertainty, since it did not identify any particular property, nor could it be known to what the lien really applied.<sup>1</sup> But where by the terms of the lease it is provided that the landlord shall have a lien on the goods or stock on the premises belonging to the tenant, the right hereby created enures by way of reservation, and is superior to that of the general creditors.<sup>2</sup>

<sup>1</sup> *Buskirk v. Cleaveland*, 41 Barb. 610.

<sup>2</sup> *Metcalf v. Fosdick*, 23 Ohio St. 114; *McCaffrey v. Woodin*, 65 N. Y. 459. And even where described as "lien or mortgage," is held a lien only. *Dalton v. Landahn*, 27 Mich. 529; and see *Metcalf v. Fosdick*, *supra*; and the case of *Hale v. Omaha Bk.*, 41 N. Y. Sup. 207, *contra*, seems overruled.

A landlord's lien for each year's rent is given by statute in many States. *Illinois*: *Thompson v. Mead*, 67 Ill. 395; *Hunter v. Whitfield*, 89 *id.* 229; *Wetzel v. Mayers*, 91 *id.* 497; and a court of equity may enforce it, *Webster v. Nichols*, 104 *id.* 160; R. S. 1874, p. 661, § 31; *Pennsylvania*: *Longstreth v. Pennock*, 20 Wall. 575; see *Edwards's Appeal*, 105 Pa. St. 103; *Louisiana*: *Marshall v. Knox*, 16 Wall. 597; *District of Columbia*: *Fowen v. Rapley*, 15 *id.* 328; *New Jersey*: where it is provided that no goods or chattels on demised premises shall be taken on attachment or execution unless creditor before removal thereof shall pay to the landlord all rent in arrears, provided that these do not amount to more than a year's rent; *Van Horn v. Göken*, 12 Vroom, 499; *North Carolina*: where a lien on crops may be created by agreement under the statute; *Durham v. Speke*, 82 N. C. 87, and see *Belcher v. Grimsley*, 88 *id.* 88; *Montague v. Miel*, 89 *id.* 137; *State v. Merritt*, *id.* 506; *State v. Rose*, 90 *id.* 712, — as to indictment for removal by the tenant of crops subject to lien; *South Carolina*: where the lien is to the extent of one third of the crop; *Kennedy v. Reames*, 15 S. C. 548; see *Carter v. Du Pre*, 18 *id.* 179; *Georgia*: where the lien attaches both for rent and supplies actually furnished by the landlord; *Saulsbury v. McKellar*, 59 Ga. 301; *Scott v. Pound*, 61 *id.* 579; *Alston v. Wilson*, 64 *id.* 482; *McCray v. Samuel*, 65 *id.* 739; *Florida*: where the lien attaches to crops and the lessee's personal property on the premises, and covers the landlord's advances; *Blanchard v. Raines*, 20 Fla. 467; *Mississippi*: Laws 1873, p. 79, 1876, p. 118; Code 1880, § 1801; *Phillips v. Douglas*, 53 Miss. 175; *Taylor v. Nelson*, 54 *id.* 524; *Cooper v. Baker*, *id.* 637; *Dogan v. Bloodworth*, 56 *id.* 419; *Wooten v. Gwin*, *id.* 423; *Love v. Law*, 57 *id.* 596; *Dunn v. Kelly*, *id.* 825; *Fitzgerald v. Fowlkes*, 60 *id.* 270; and the lien subsists for thirty days after the removal of the crops from the premises; *Alabama*: Rev. Code, 2961-2963, Code, 3467-3478; *Folmar v. Brantley*, 57 Ala. 588; *Collins v.*

The undertaking of a surety who signs upon the face of the agreement with his principal, although he adds the word "surety" to his name, is an original and not a collateral undertaking.<sup>1</sup> If several persons become bound in a lease for the payment of rent, the lease is in contemplation of law to them all if there is nothing in the body of the instrument to negative that conclusion.<sup>2</sup> And where sureties upon a lease have bought the leasehold premises on a sale, to indemnify themselves for payments of rent, they become assignees of the lease and liable as such to the lessor.<sup>3</sup> But where a man

Whigham, 58 *id.* 438; *Starens v. Allen*, *id.* 316; *Abraham v. Hall*, 59 *id.* 386; *Masterson v. Bentley*, 60 *id.* 520; *Ellis v. Martin*, *id.* 394; *Smith v. Bryant*, *id.* 235; *Lavender v. Hall*, *id.* 214; *Westmoreland v. Foster*, *id.* 448; *Lomax v. Leonard*, *id.* 537; *Evans v. English*, 61 *id.* 416; *Steiner v. McCall*, *id.* 413; *Boggs v. Price*, 64 *id.* 514; *Shields v. Purnell*, *id.* 504; *Schaife v. Stovall*, 67 *id.* 237; *Corbitt v. Reynolds*, 68 *id.* 378; *Wilson v. Stewart*, 69 *id.* 302; *Tuttle v. Walker*, *id.* 172; *Wilkinson v. Kettler*, *id.* 435; *Kennan v. Wright*, *id.* 434; *Agee v. Mayer*, 71 *id.* 88; *Robinson v. Lehman*, 72 *id.* 401; *Jackson v. Bain*, 74 *id.* 328; *Coleman v. Siler*, *id.* 435; *Lake v. Gaines*, 75 *id.* 143; *Bell v. Hurst*, *id.* 44; *Drakford v. Turk*, *id.* 339; *Texas*: where the statute gives a lien to landlords in towns and cities upon goods, wares, and merchandise in the rented premises to secure rents that may become due; *Rosenberg v. Shaper*, 51 *Tex.* 134; *Bouchier v. Edmondson*, 58 *id.* 675; *Association v. Cochran*, 60 *id.* 620; *Templeman v. Gresham*, 61 *id.* 50; *Meyer v. Oliver*, *id.* 584; *Arkansas*: *Pluckett v. Reed*, 31 *Ark.* 131; *Tignor v. Bradley*, 32 *id.* 781; *Lambeth v. Ponder*, 33 *id.* 707; *Watson v. Johnson*, *id.* 737; *Lemay v. Same*, 35 *id.* 225; *Reavis v. Barnes*, 36 *id.* 575; *Meyer v. Bloom*, 37 *id.* 43; *Brown v. McGehee*, 38 *id.* 329; *Hammond v. Harper*, 39 *id.* 248; *Varner v. Rice*, *id.* 344; *Kansas*: *Neifort v. Ames*, 26 *Kan.* 516; *Tarpy v. Persing*, 27 *id.* 745; *Conwell v. Kuykendall*, 29 *id.* 707; *Code*, § 235; *Missouri*: *Wag. St. p.* 880, § 18; *Hubbard v. Moss*, 65 *Mo.* 647; *Crawford v. Coil*, 69 *id.* 588; *Kentucky*: *Gen. Sts. c.* 66, *Arts.* 12, 13; *English v. Duncan*, 14 *Bush*, 377; *Stone v. Bohm*, 79 *Ky.* 141; *Iowa*: on all property subject to execution; *Code*, §§ 2017, 2018; *Rotzler v. Rotzler*, 46 *Iowa*, 189; *Pitkin v. Fletcher*, 47 *id.* 58; *Martin v. Stearns*, 52 *id.* 345; *Van Patten v. Leonard*, 55 *id.* 520; *Gilbert v. Greenbaum*, 56 *id.* 211; *Rollins v. Proctor*, *id.* 326; *Thorpe v. Fowler*, 57 *id.* 541; *Richardson v. Petersen*, 58 *id.* 724; *Holden v. Cox*, 60 *id.* 449; *Indiana*: *R. S.* 1881, § 5224; *Kennard v. Harvey*, 80 *Ind.* 37; *Tennessee*: *Act* 1875, c. 116; *Code*, § 3543; *Lewis v. Mahone*, 9 *Baxt.* 374; *Richardson v. Blakemore*, 11 *Lea*, 290.

<sup>1</sup> *Perkins v. Goodman*, 21 *Barb.* 218; *Hunt v. Adams*, 5 *Mass.* 358.

<sup>2</sup> *Magee v. Fisher*, 8 *Ala.* 320.

<sup>3</sup> *Buland's Appeal*, 66 *Pa. St.* 470.

guarantees the payment of rent by an indorsement on the lease, his undertaking is distinct from that of the lessee, and they cannot without statutory aid be properly joined in one suit.<sup>1</sup>

§ 424 *b*. **Obligations of Tenant's Surety.** — The obligation of a surety is to be construed strictly, and cannot be extended beyond its plain terms, by operation of law, without his consent; and therefore where a lease was made for one year, with the privilege to the tenant to retain the premises at the same rent as long as he might wish to do so, the surety was held not to be bound beyond the year without a new agreement entered into by him.<sup>2</sup> So if a lease is made to two persons, one as principal, and the other as surety, and the principal alone occupies and then holds over, there is no novation of the contract so as to render the surety liable for rent accruing after the expiration of the term.<sup>3</sup> And any material alteration in the relation of the original parties to each other, without the consent of the surety, will operate as a discharge of his liability; as, if a lessor enlarges the time of performance, or makes a new lease of the premises, either to the lessee or to some other person.<sup>4</sup> But a surrender of the term and acceptance thereof does not discharge a tenant, nor his surety, from the payment of rent already due and payable.<sup>5</sup> A surety is not ordinarily discharged by reason of the negligence or failure of the lessor to enforce payment of the rent; nor is the lessor under an obligation to notify the surety that the lessee has abandoned the premises.<sup>6</sup> Nor

<sup>1</sup> *Virden v. Ellsworth*, 15 Ind. 144.

<sup>2</sup> *Brewer v. Thorp*, 35 Ala. 9; *Dodge v. Burdell*, 13 Conn. 170. And see *Union Bank v. Ridgely*, 1 Harr. & G. 324. But *Coe v. Vogdes*, 71 Pa. St. 383, is *contra*. In *Pleasanton's Appeal*, 75 Pa. 344, however, where a surety upon like lease gave notice that he would not further be held, the court decided that he was released.

<sup>3</sup> *Brewer v. Knapp*, 1 Pick. 382.

<sup>4</sup> *White v. Walker*, 31 Ill. 422; *Miller v. Stewart*, 9 Wheat. 680; *Rathbone v. Warren*, 10 Johns. 587.

<sup>5</sup> *McKenzie v. Farrell*, 4 Bosw. 192.

<sup>6</sup> *Elmore v. Robinson*, 18 La. Ann. 651; *Ledoux v. Jones*, 20 La. 539; and see *Craig v. Parker*, 40 N. Y. 181.

does a breach of the landlord's covenant to repair, since it does not excuse the tenant's neglect to pay rent, discharge the surety.<sup>1</sup> And where a tenant was induced to accept a lease by a fraudulent representation of the landlord as to the fitness of the premises for occupation, but continued to occupy and pay rent for nine months, neither he nor his surety were permitted to set up the objection of fraud.<sup>2</sup> Nor is he discharged by the landlord's receiving a note of trust or order upon a third person for the rent, or by any other device short of absolute payment, unless by a mutual agreement;<sup>3</sup> nor by an agreement that the tenant shall occupy a different part of the premises from that originally demised;<sup>4</sup> nor by an agreement to put in a new tenant when the original tenant is unable to pay rent;<sup>5</sup> nor by the acceptance of the rent monthly, instead of quarterly, as reserved by the lease; nor for the reason that the tenant was excluded from the use of certain privileges to which the lease entitled him.<sup>6</sup> A mere neglect to sue the principal at request of surety will not discharge the surety, unless the principal were then solvent and subsequently becomes insolvent.<sup>7</sup> And a surety has no right to call upon the landlord to distrain the tenant's goods.<sup>8</sup> But the contract of the surety will be discharged by a failure of the lessor to give him reasonable notice of the default of the principal debtor. For upon general principles he is entitled to such notice in order that he may take measures to indemnify himself against ultimate loss; and he will therefore be discharged, if he can show that he has sustained loss in consequence of the negligence of the party guaranteed to

<sup>1</sup> *Coe v. Vogdes*, 71 Pa. St. 383; *Ellis v. McCormick*, 1 Hilt. 313. And of course not by the destruction of the premises. *Kingsbury v. Westfall*, 61 N. Y. 356.

<sup>2</sup> *Rosenbaum v. Gunter*, 3 E. D. Smith, 203.

<sup>3</sup> *Burnham v. Hubbard*, 36 Conn. 539.

<sup>4</sup> *Shufeldt v. Gustin*, 2 E. D. Smith, 57.

<sup>5</sup> *Ogden v. Roe*, 3 E. D. Smith, 312.

<sup>6</sup> *Morgan v. Smith*, 14 N. Y. 244.

<sup>7</sup> *Huffman v. Hulbert*, 13 Wend. 377; *Herrick v. Boest*, 4 Hill, 650; *Field v. Cutler*, 4 Lans. 195.

<sup>8</sup> *Ruggles v. Holden*, 3 Wend. 216.

give him such notice.<sup>1</sup> Nor is the surety of a tenant liable, on his covenant to have the property returned in good order, for the failure of his principal to return the house and lot at the expiration of the term, when possession was not requested, nor any readiness to receive possession expressed.<sup>2</sup>

<sup>1</sup> *Oxford Bank v. Haynes*, 8 Pick. 423; *Talbot v. Gay*, 18 Ill. 534; *Douglas v. Reynolds*, 1 Pet. 114; *Cannon v. Gibbs*, 9 S. & R. 202; and see *Union Bank v. Coster*, 3 N. Y. 203.

<sup>2</sup> *Kyle v. Proctor*, 5 Bush, 493.

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